2009

Rita Y. Richins v. James E. Richins : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

RITA Y. RICHINS,

Petitioner and Appellant,

vs.

JAMES E. RICHINS,

Respondent and Appellee.

APPELLEE'S BRIEF

Case No. 20090365

BRIEF OF APPELLEE JAMES E. RICHINS

APPEAL FROM DECISION OF THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, HONORABLE DENISE P. LINDBERG

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STATEMENT OF ISSUES AND STANDARD OF REVIEW

I. Issue : The Trial Court Did Not Commit Reversible Error When it Found Appellant Had Earned $3,800 Per Month.

Standard of Review: "An appellate Court will not reverse the findings of fact of a trial Court sitting without a jury unless they are. . . ***clearly erroneous***." (quoting MacKay v. Hardy, 896 P.2d 626, 629 (Utah 1995). Moreover, in those instances in which the trial Court's findings include inferences drawn from the evidence, the findings will be upheld unless the logic upon which their extrapolation from the evidence was based "is so flawed as to render the inference ***clearly erroneous***." State v. Briggs, (2008) UT 75, ¶11, 197 P.3d 628,631, *quoting* Glew v. Ohio Sav. Bank, (2007) UT 56, ¶18, 184 P.3d 791.

II. Issue: The Trial Court Did Not Commit Reversible Error When it Chose Not To Deduct $27,207.59 from Appellant's Earnings.

Standard of Review: Same as Issue I above.

III. Issue : The Trial Court Did Not Commit Reversible Error When it Awarded the Appellant Her Unpaid Wages as Part of the Division of Marital Assets.

Standard of Review: Same as Issues I and II above. A valuation or distribution issue is reviewed under a ***clearly erroneous*** standard of review. Stonehocker v. Stonehocker, (2008) UT App 11, ¶44, 176 P.3d 476 ("We defer

to the trial Court in its findings of fact related to property valuation and distribution). *See* Howell v. Howell, 806 P.2d 1209,1211 (Utah App. 1991) "Findings of fact in divorce appeals are subject to the clearly erroneous standard of review such that due regard shall be given to the opportunity of the trial Court to judge the credibility of the witnesses." (internal quotation marks omitted).

IV. Issue : The Decree of Divorce Entered in this Case is Not A "Punitive" Decree and is Not Contrary to Utah Law.

The plain error exception enables the appellate court to "balance the need for procedural regularity with the demands of fairness." State v. Verde. 770 P.2d 116, 122 n.12 (Utah 1989). At bottom, the plain error rule's purpose is to permit us to avoid injustice. State v. Eldredge, 773 P.2d at 35 n.8. (Utah 1989).

STATEMENT OF THE CASE

This divorce case was tried before the bench on August 4th and 5th, 2008, Judge Denise P. Lindberg residing. The Court, upon the conclusion of the case, took the matter under advisement. The Court entered its Findings of Fact, Conclusions of Law, and Order on October 15, 2008.[1] There were numerous post trial pleadings filed and on April 15, 2009 the matter resulted in entry of a Decree of Divorce based on the findings. Appellant then filed her Notice of Appeal. R. at

[1]Appellant's opening Brief failed to attach as an Addendum the Findings of Fact, Conclusions of Law, and Order filed October 15, 2008, and the Decree of Divorce, filed April 15, 2009. Appellee hereby attaches both pleadings as an Addendum hereto. R. at 1704-1721; (Findings); 1907-1927 (Decree).

1704-1721, 1907-1927, 1968-1969.

Appellant, the wife in this divorce case, in an effort to get what she wanted, decided at the beginning of the case (3 + years prior to trial) that she was going to hide hundreds of thousands of dollars of compensation owed her for her services over many years to a family Trust she had worked for, and eventually taken control over. This Trust is worth millions of dollars. Comfortable in her position of control, she determined she could avoid sharing her compensation with her husband and at the same time reap the benefit of his hard earned monies.

Appellant, over the course of this case and up to trial, repeatedly denied any right to income from the Trust for her full-time labor for many years. She repeatedly signed things and verbally represented under oath that any monies she had taken over the years were "gifts", not compensation.

Appellee knew this position was untrue in his heart, but struggled with proof in that Appellant controlled the Trust, including its records. Appellee had worked for his adult life and saved money, operating a crane, with the hope that upon retirement the parties would live comfortably with the money from the Trust they were owed.

On the eve of trial Appellant become fearful that her scheme would be discovered through testimony of her siblings and others, and in a surprise move, finally admitted that Appellee was right and that she was entitled to a substantial amount of compensation for her services to the Trust.

The following trial was interesting as substantial evidence, witness needs, documents, and strategy had been turned upside down with the dilatory admission of the key fact in the case.

The Court then was tasked with having to calculate Appellant's compensation given Appellant's complete lack of credibility and new strategy aimed at minimizing her compensation claim.

As all trial judges are forced to do, the Court believed some evidence over other evidence based on credibility and reliability. Appellant appeals the Court's findings of fact in relation to the compensation and it is clear to Appellee that this Appeal is without merit. There is reliable evidence to support the three findings this Appeal challenges, and merely because the Court did not believe some of the evidence "created" and not corroborated by Appellant, she is upset. The standard of review is "clearly erroneous". This Appeal does not meet that standard. Fees and costs should be awarded Appellee.

STATEMENT OF FACTS

In Appellant's "Statement of Facts" she does not set forth all the relevant facts applicable to the appealed issues that were presented to the trial Court. In fact, a careful review of the Appellant's alleged facts indicate that most are not relevant to the issues raised on Appeal (*see*, #s 1,2,3,5,7,8,9,10,11,12,13,14 and 21). Appellant's remaining "facts" are not in all respects a true rendition of the record. For example, Appellant's facts #17 and #19 relating to admission of

exhibits #22 and #50 fail to clarify that although the exhibits were admitted into evidence, they were NOT agreed to as to truthful and did not therefore automatically become uncontested facts. Quite to the contrary, the credible testimony and the ultimate findings of the Court were that the exhibits were not truthful or reliable, and that credible evidence contradicted said exhibits. The mere fact that Appellee allowed the exhibits to be admitted into evidence did not make them true. It should be noted that each of those two exhibits were generated by the Appellant, or her counsel for the Trust, and contradict her sworn testimony in the case. Lastly, Appellant's fact #26 is untrue. The Court did not conclude that the monies "allegedly" paid by the Trust to the Appellant for services and consumed by the parties was a reliable fact. Appellee did not contest the admission of exhibit #22 (wherein the monies are addressed) but thereafter presented evidence to the court's satisfaction that it was unreliable and the Court so found.

The Appellant also omits key facts that are essential to understanding the trial Court's findings in this case. Some of the facts not clearly stated or omitted completely by Appellant are as follows:

1. Petitioner knowingly and repeatedly lied in her Court filings and in this litigation consistently over three years. Through cross-examination at trial, Petitioner's testimony was repeatedly shown to have been untruthful and evasive. (Findings of Fact, Conclusions of Law and Order at ¶10).

2. The Appellant admitted under cross examination at trial that she repeatedly lied in her deposition under oath when she represented that she was NOT entitled to any money from the trust. (T 2027 at 139, lines 16-19).

3. The Appellant admitted under cross examination at trial that during the three years of discovery and related requests thereto, for every discovery request *ever* done in the case, formally or informally, Appellant lied when she consistently represented that she was not entitled to any wages for her work for the Trust. (T 2027 at 139, lines 20-25).

4. Up to approximately one week before the beginning of trial in this matter, Appellant stood behind her repeated lies. (T 2027 at 140, lines 1-4).

5. Appellant's pattern of lying also included, in addition to the failure to disclose hundreds of thousands of dollars due her for her work for the family Trust, lies about her other assets. (T 2027 at 141-142, lines 18-4).

6. Appellant even went so far as to state under oath in her deposition that she was NOT employed at all for the years 2000, 2001, 2002, 2003, 2004, 2005, 2006 and to the current date of the deposition. (T 2027 at 142-143, lines 5-25, and 1-15).

7. Appellant admited under cross examination at trial that she was employed during all of the years mentioned above by the Trust and that the Trust owed her for her services. (T 2027 at 143, lines 12-15).

8. Not only did Appellant lie about working, and being owed monies for her services, she stated that all monies she had received from the Trust during the relevant years for work she had done were considered by her to be "gifts". (T 2027 at 144, lines 1-8).

9. Appellant even went so far as to say she had not received compensation for working for the Trust back to 1998. (T 2027 at 144-145, lines 24-10).

10. Appellant represented under oath in her deposition that she did NOT keep track of her time that she worked for the Trust. At trial she submitted an exhibit (Exhibit #22) that was unsigned, undated, mostly handwritten representation of her alleged hours worked for days and years for the Trust, and testified that in fact these were records of time spent working for the Trust. (T 2027 at 148-149, lines 20-25 and 1-21, and Exhibit #22).

11. The hours Appellant finally submitted on the eve of trial to indicate all work done for the Trust and the compensation owed indicated among other suspicious things that she had worked 24 hours a day, 7 days a week, for 5 straight weeks. Her hourly pay for that month alone would be $8,424.00. (Exhibit #22)

12. The Appellant admits to misleading counsel for Appellee during the pendency of the case by not telling the truth "Q: Were you not frank with me in your deposition?" A: "I was not frank with you." Q: Many times, correct?" A: "Correct". (T 2027 at 149, lines 18-21.

13. Appellant claims she lied to Ford Motor Credit to get a loan. (T 2027 at 164, lines 5-6).

14. In cross-examination at trial Appellant finally admitted that she lied repeatedly in this case to get what she wants. (T. at 164, lines 7-13, Q: "have you lied repeated times in this case, Ms. Richins, - repeated times, numerous times, to get what you want? A: "Yes").

15. The Court found that Appellant's testimony utterly lacked credibility and should be given weight only to the extent there was corroborative evidence to support it. (Findings of Fact, Conclusions of Law and Order at ¶10)

16. Appellant testified that she is a co-trustee for the Helen Powell Family Trust. (T 2027 at 94, lines 18-20).

17. Appellant testified when asked how many years she had been a trustee that she didn't know for sure, stating "I don't . . . six year, seven, I don't know". (T 2027 at 151, lines 7-9).

18. Appellant testified that she didn't know what agreement was made as far as payment to her from the trust. "I don't really know it …" (T. at 2027 127 line 25).

19. Appellant testified that she has authority to write checks from the Trust bank accounts. (T 2027 at 153, lines 4-9).

20. Appellant testified that as co-trustee she did *not* keep a contemporaneous record of the time she worked for the Trust. (T 2027 at 148, lines 20-25, T. at 149, lines 1-3).

21. Appellant testified that she had to *re-create* records in order to submit a claim to the Trust as reflected in her personally manufactured Appellant's Exhibit #22. (T 2028 at 237, lines 8-10).

22. Appellant testified that she did submit the application to Ford Motor Credit and that she authorized and stood behind the information provided on that application. (*See* Respondent's exhibit #28, T 2027 at 166, lines 24-25, T 2027 at 167, lines 1, 2. Exhibit 28).

23. Appellant applied for the loan from Ford Motor Company individually, not in the name of the Trust, and the application (Exhibit 28) does not indicate Appellant applied in the name of the Trust or as trustee of the Trust. (T 2027 at 220 at lines 10-14).

24. Appellant testified that she recognized and was familiar with the balance sheet of the Trust prepared in September 2000, which indicated the Trust was worth over $3.2 million. (T 2027 at 179, lines 10-18).

25. Appellant claims the [Powell Family Trust] did not have the liquid ability to pay her while at the same time she admits that the Trust was giving her and each of her 4 siblings "gift" payments of $500 per month, from May 2001 until January 2005. (T 2027 at 121, lines 20- 25, T 2027 at 122, line 1-17).

26. Appellant submitted two separate sworn Financial Declarations to the Court, neither of which described or listed her claim to wages owed from the Trust, among other glaring omissions and misstatements under oath. (*See* Pet. ex. 59, Resp. ex. 33).

27. The Court found that although Petitioner had control of the Trust and could have paid herself for her services at the time they accrued, Appellant intentionally chose not to withdraw those funds but to shelter them in the Trust as unrecognized income. (*See* Findings of Fact ¶15).

28. Exhibit #22 was prepared by Appellant to show alleged payments of $27,207.50 to her and Appellee for work for the trust. (*See* Exhibit 22, T 2027 at 124 lines 15-17, T 2027 at 125-126, lines 19-2).

29. Appellee testified contrary to Exhibit #22 that he in fact disputed the accounting of Appellant for hours worked for the trust, and stated contrary to Exhibit #22 that he in fact did NOT get paid according to the representations in said exhibit. (T 2028 at 387 lines 2-25 to T 2028 at 388, lines 1-5).

30. The Court found that although Petitioner is technically a co-trustee of the Trust (with her mother), the evidence before the Court strongly suggested that Petitioner had exercised full control over the Trust's assets and had used the Trust structure in whatever manner she deemed most beneficial to her personal interest. (*See* Findings of Fact ¶18).

31. Appellant repeatedly requested (and the Court complied) that the Court award her the party's marital residence, a non liquid asset, which has a value of $181,000.00 (T 2027 at 19 lines 14-19, and T 2028 at 430 line 16).

32. The Decree of Divorce equally divides the marital estate by awarding each party the equivalent of 50 percent of every dollar of value determined by the Court to be a part of the estate. In fact, the Decree awarded Appellee as part of his 50% almost three times the amount of IRA funds (not liquid by definition of Appellant). (*See* Decree of Divorce).

33. Both parties were awarded various types of assets, including substantial cash, personal and real property, pension or retirement related accounts. In fact, by the time of trial the marital estate had a net value of over $760,000, after already paying out equally to the parties approximately $400,000 earlier in the litigation. The net value was therefore approximately 1.16 million dollars. (*See* Decree of Divorce).

34. Nowhere in the Decree of Divorce, nor the Findings of the Court, does the Court mention or even infer that it is giving Appellee an advantage in the distribution of assets, in amount or type, or to punish, or to in anyway react punitively against the Appellant for her actions in the case. (*See* Decree of Divorce and Findings of Fact).

ARGUMENT

This Appeal is simply an attack on the findings (three of them) of the trial Court. After a review of the trial transcript it is clear that the Judge had ample evidence to support her rulings. This is a case where the Appellant simply disagrees with the result, not one where the lower Court made any errors. The Appellate Court is not to revise any findings of fact of the trial Court unless they find them to be clearly erroneous (MacKay v. Hardy, 896 P.2d 626, 629 (Utah 1995).

The broad discretion accorded the trial Court in making findings, particularly in the context of a divorce proceeding, simply acknowledges that the trial Court is seeking to make an equitable distribution of the marital estate and that the trial Court is best suited to weigh the evidence because "the trial judge has observed 'facts' such as a witness's appearance and demeanor, relevant to the application of the law that cannot be adequately reflected in the record available to appellate courts. Jeffs v. Stubbs, 970 P.2d 1234, 1244 (Utah 1998) (quoting State v. Pena, 869 P.2d at 939 Utah 1984).

The present case was a bench trial. "In a bench trial or other proceeding in which the judge serves as fact finder, the Court has considerable discretion to assign relative weight to the evidence before it. This discretion includes the right to minimize or even disregard certain evidence." Thus, we defer to the trial Court's assessment on this matter. *See* 438 Main St. v. Easy Heat, Inc., 2004 UT

72, ¶75, 99 P.3d 801. In this case, as the Appeals Court will quickly see, the lower Court did in fact disregard certain evidence, and rightfully so.

Although there were other witnesses that testified in the trial, the only witnesses that testified on the issues of this appeal were the parties. There were also very few documents presented on the issues being appealed, thus making this review really quite narrow. In fact, Appellant's Appeal rides solely on Exhibit #22. That Exhibit will be herein examined, as the trial Court did, and found to be severely lacking in credibility. The record at trial, based on the testimony of the parties and the documents presented clearly shows that the lower Court had sufficient evidence to support its findings and conclusions on each any every issue that form the basis of this Appeal.

There are four (4) issues the Appellant is asking this Court to review. Following is Appellee's position on each:

I. Issue : The Trial Court Did Not Commit Reversible Error When it Found Appellant Had Earned $3,800 Per Month.

As stated in the Statement of Facts above, the Appellant contended for over three years during the pendency of this litigation that she was not to be compensated for working for her family Trust, and that said Trust owed her nothing for her services. Appellee tried through letters, written discovery, depositions, and third party witnesses, to prove that in fact the full time and efforts that Appellant spent "working" for the Trust of her parents for many years was for

compensation and that she was lying. The trial Court recognized this when it said in its Findings, "*It is undisputed that the Trust documents authorized payment for compensation of trustees who work for the Trust. Neverthelesss, through much of the pendency of this case Petitioner (Appellant) adamantly denied, under oath, that she had a compensation arrangement with the Trust. Instead, she asserted that her services to the Trust were in a volunteer capacity to help her parents. Petitioner's belated acknowledgment that she is owed compensation by the Trust did not occur until July 30, 2008-practically on the eve of trial.*" Findings of Fact, Conclusions of Law, and Order at page 4, footnote 6.

On the "eve of trial", Appellant for the first time, and totally contrary to copious under oath representations to the contrary, finally relented and admitted that she was in fact entitled to substantial compensation for several years from the Trust. This admission sparked a serious debate about how to properly calculate that compensation given the credibility issues presented by the historical denials of the Appellant on the issue. Literally tens of thousands of dollars and months turning into years could have been avoided had this truth been revealed earlier, instead of secreted away until the pressure of trial and potential discovery brought Appellant to at least a portion of truth. Indeed, the Court stated in her Findings *"Appellant's testimony utterly lacked credibility and should be given weight only to the extent there was corroborative evidence to support it."* (Findings of Fact, Conclusions of Law and Order at ¶10).

On the eve of trial and at trial, Appellant presented a self serving, undated, unsigned, handwritten exhibit purported to be a calculation of what the Trust owed her (*See* Exhibit 22). She concluded based on their Exhibit that the Trust owed her some $118,000 for her many years of service. Appellee disagreed with the calculations and amounts but was relieved with the admission that at least some amount was due. Although not objecting to the admission of Exhibit #22, Appellee made it clear that he did not agree to its content or reliability (*see* additional statements of fact below on the credibility problems with Exhibit #22).

In contrast, Appellee put into evidence Exhibit #28, a Ford Motor Credit Application, wherein the Appellant applied for a loan during the relevant time period. This document was a loan application form prepared by a third party, filled out admittedly at the direction of Appellant herself, signed as acknowledged by Appellant, and used to secure money from a lending institution. The Court in its discretion found the loan application to be an admission against interest, more credible, and used the same to help fashion a finding on the compensation owed the Appellant from the Trust. (*See* Findings, ¶'s 13 and 14). This finding is being appealed as clearly erroneous.

For the Appellant to claim that the Court somehow based its finding on "inference" or "speculation" is clearly unsupported by the record. The loan application is clearly evidence that the Court could and in fact did rely on. A simple reading of the Court's Findings, paragraphs 13 and 14, puts an abrupt end

to this issue on appeal. At one point the Court stated on the issue *"Whether or not those representations to Ford Credit were truthful, the Court finds that it is fair and appropriate to hold Petitioner (Appellant) to the certification she made in that credit application as an admission against interest. Therefore, the Court finds that during the term of the marriage Petitioner was employed by the Trust for no less than 82.3 months at a gross montly wage of $3,800 per month, for total gross imputed earnings during the period of $312,740."* Findings at ¶ 14.

It seems that Appellant in her brief is arguing that because she lied so many times, that the Court committed clear error in using one of her "alleged" lies to determine her compensation. It seems illogical for the Appellant to argue that the Court should have believed one purported false document submitted by Appellant over another.[2] Appellant argues that a letter, put into evidence without testimony of its author (who did not testify nor present himself for cross examination, (*See* Exhibit #50), together with the document put together by Appellant herself (*See* Exhibit #22), and another loan application [3] that was not put into evidence or testified to by anyone at trial are uncontroverted. This is simply wishful thinking.

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[2] Note that appellant now claims she lied in the Ford loan application as well. (T 2027 at 149, lines 18-21)

[3] Appellant argues there is another credit application in the year 2003. This application is not an exhibit in this case. It is unclear how Appellant now tries to rely on a document she herself failed to put in evidence or argue at trial. The Appellant was unable in her brief herein to corroborate her position that the 2003 loan application is relevant given the fact that she chose NOT to introduce the

It is not this Court's obligation to undertake an independent assessment of the evidence presented during the course of trial and reach separate findings with respect to that evidence. Rather, it is to endeavor only to evaluate whether the Court's findings are so lacking in support that they are against the clear weight of the evidence.

The trial court was tasked to weigh the evidence presented on each and every issue of this case. The Court presided over this two day trial, took copious notes, participated in the examination of witnesses as she saw fit, and spent over two months before making her Findings of Fact, Conclusions of Law, and Order. She then entertained extensive post trial motions and had ample opportunity to reconsider all of her Findings and Conclusions and Order before signing the Decree of Divorce.

This Appeals Court has been asked to review the results of the bench trial for sufficiency of evidence in this case and to determine if the lower Court did something that was "clearly erroneous". "When reviewing a bench trial for

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2003 application into evidence, and she also more importantly chose NOT to testify about the application, nor bring it up anywhere in the proceedings before the Judge during the two day trial. To speculate and try to infer that this document, which was not even discussed at trial, is now relevant in an analysis of this Court's review of the lower Court is insincere. Cross examination of this potential document and the rebuttal testimony it MAY have solicited MAY have been so damaging to Appellant that she obviously chose not to use said potential evidence to bolster her position that the Court should consider that evidence over the 2004 application (Exhibit #28) that it decided to rely on.

sufficiency of the evidence, we must sustain the trial court's judgment unless it is against the clear weight of the evidence, or if [we] otherwise reach a definite and firm conviction that a mistake has been made." State v. Gordon, 2004 UT 2, ¶5, 84 P.3d 1167.

This Appeal Court is not tasked with the duty to tell trial Court Judges which piece of competing evidence they are to adopt, let alone when compared to a document that was not even a part of the trial at all.

A brief review of just a few of the facts as set forth herein is appropriate given the Appellant's position that the Court committed reversible error, meaning it's decision was "clearly erroneous" when it determined the amount of compensation Appellant was entitled to from the Trust under circumstances where Petitioner knowingly and repeatedly lied in her Court filings over three years of discovery. Through cross-examination at trial Petitioner's testimony was repeatedly shown to have been untruthful and evasive. (Findings of Fact, Conclusions of Law and Order at ¶10). In addition, the Appellant admitted under cross examination at trial that she repeatedly lied in her deposition under oath when she represented that she was NOT entitled to any money from the Trust. (T. at 139, lines 16-19). The Appellant admitted under cross examination at trial that during the three years of discovery and related requests thereto, for every discovery request *ever* done in the case formally or informally, Appellant lied when she consistently represented that she was not entitled to any wages for her

work for the Trust. (T 2027 at 139, lines 20-25). Up to approximately one week before the beginning of trial in this matter, Appellant stood behind those repeated lies under oath. (T 2027 at 140 lines 1-4).

Appellant's pattern of lying also included, in addition to the failure to disclose hundreds of thousands of dollars due her for her work for the family Trust, lies about her bank accounts. (T 2027 at 141-142, lines 18-4). Appellant even went so far as to state under oath in her deposition that she was not even employed for the years 2000, 2001, 2002, 2003, 2004, 2005, 2006 and to the current date of the deposition. (T 2027 at 142-143, lines 5-25, and 1-15). Appellant admitted under cross examination at trial that she was employed during all of the years mentioned above by the Trust and the Trust owed her for her services. (T 2027 at 143, lines 12-15). Not only did Appellant lie about her working, and being owed monies for her services, she represented time and time again under oath that all monies she had received from the trust for work she had done were "gifts". (T 2027 at 144, lines 1-8).

Appellant represented under oath in her deposition that she did NOT keep track of her time that she worked for the Trust. At trial she submitted an exhibit (Exhibit #22) an unsigned, undated, handwritten representation of her alleged hours worked for days and years for the Trust. (T 2027 at 148-149, lines 20-25 and 1-21, and Exhibit #22).

The Appellant has no credibility, and her "testimony" in the exhibit she created (Exhibit #22) also has no credibility. Just because she wrote the lie rather than merely said it, it is the same. The Appellant admits to misleading counsel for Appellee during the pendency of the case by not telling the truth "Q: Were you not frank with me in your deposition?" A: "I was not frank with you." Q: Many times, correct?" A: "Correct". (T 2027 at 149 lines 18-21). Appellant claims she lied to Ford Motor Credit to get a loan. (T 2027 at 164, lines 5-6). Although initially trying to evade the question, Appellant admitted at trial that she has lied repeatedly in this case to get what she wants. (T 2027 at 164, lines 7-13) the Appellant stated to the Q: "have you lied repeated times in this case, Ms. Richins, - repeated times, numerous times, to get what you want? A: "Yes"). The Court found that Appellant's testimony utterly lacked credibility and should be given weight only to the extent there was corroborative evidence to support it. (Findings of Fact, Conclusions of Law and Order at ¶10).

Appellant testified that she is a co-trustee for the Helen Powell Family Trust. (T 2027 at 94, lines 18-20). Appellant testified when asked how many years she had been a trustee that she didn't know for sure, stating "I don't . . . six year, seven, I don't know". (T 2027 at 151, lines 7-9). Appellant testified that she didn't know what agreement was made as far as payment to her from the trust. "I don't really know it ..." (T 2027 at 127 line 25). Appellant testified that she has authority to write checks from the Trust bank accounts. (T 2027 at

153, lines 4-9). Appellant testified that as co-trustee she did *not* keep a contemporaneous record of the time she worked for the Trust. (T 2027 at 148 lines 20-25, T 2027 at 149, lines 1-3). Appellant testified that she had to *re-create* records in order to submit a claim to the Trust as reflected in her personally manufactured Appellant's Exhibit #22. (T 2028 at 237, lines 8-10).

In relation to Exhibit #28, Appellant testified that she did submit the application to Ford Motor Credit and that she authorized and stood behind the information provided on that application. (*See* Respondent's exhibit #28, T 2027 at 166, lines 24-25, T 2027 at 167 lines 1, 2. Exhibit 28). Appellant applied for the loan from Ford Motor Company individually, not in the name of the Trust, and the application (Exhibit 28) does not indicate Appellant applied in the name of the Trust or as trustee of the Trust. (T 2027 at 220 lines 10-14).

Appellee testified contrary to Exhibit #22 that he in fact disputed the accounting of Appellant for hours worked for the trust, and stated contrary to Exhibit #22 that he in fact did NOT get paid according to the representations in said exhibit. (T 2028 at 387, lines 2-25 to T 2028 at 388, lines 1-5).

The Court found that although Petitioner is technically a co-trustee of the Trust (with her mother), the evidence before the Court strongly suggested that Petitioner had exercised full control over the Trust's assets and had used the Trust structure in whatever manner she deemed most beneficial to her personal interest. (*See* F. of F. ¶18).

Even if this Court determines the trial Court made certain "inferences" to come to the Findings set forth, those inferences do not rise to the level of being clearly erroneous. For this finding to be reversed, the inference has to be "so flawed as to render the inference clearly erroneous. State v. Briggs, 2008 UT 75, ¶ 11, 197 P.3d. 628, 631, quoting Glew v. Ohio Sav. Bank, 2007 UT 56, ¶ 18, 184 P.3d 791.

In Gillmor v. Gilmor, 745 P.2d 461, 464 (Utah Ct. App. 1987), cert denied 765 P.2d 1278 (Utah 1988), quoting Bendorf v. Volkswagenwerk Aktiengeselischaft, 564 P.2d 619, 624 (N.M. Ct. App. 1977) the Court provided guidance on this standard when it stated that an inference to be clearly erroneous depends on whether it is "a rational and logical deduction from the facts admitted and established by the evidence, when those facts are viewed in the light of common experience." The lower Court's finding related to the compensation Appellant is entitled to from the Trust she worked for and hid income from for years is certainly not "clearly erroneous" under that standard of review.

In its Findings the trial Court acknowledged and specifically referred to the existence of all evidence submitted in reference to unpaid wages claimed by Appellant. The trial Court also weighed the sources of the evidence provided. The trial Court's findings were well reasoned after a thorough review of all the evidence submitted. There is absolutely no evidence established by Appellant that

the trial Court committed an error. The trial Court's findings and calculations are rational and logical and based on the facts and evidence presented.

It is the role of the fact finder to assess the credibility of witnesses and to weigh the evidence, *See* Utah R. Civ. P. 52(a) (Findings of Facts, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial Court to Judge the credibility of the witnesses.") State v. Hodges, 798 P.2d 270, 274 (Utah App. 1990)

The Ford Credit Application (Exhibit #28) was submitted by Appellant to secure a loan to purchase a vehicle. Since it is a crime to knowingly provide false information to a lending institution, the applicant has a rather stringent obligation to provide truthful information. All financial institutions are required to follow government and state regulations in lending procedures. We can reasonable expect that Ford Credit required a credit check of the credit worthiness of the applicant and a review of the debt to income ratio to determine the applicant's ability to repay the loan. Ford Motor Credit approved Appellant for a loan based on the information provided in the application. The vehicle was purchased with funds from this loan and titled in Appellant's name.

Furthermore, it would seem that Appellant to this date continues to earn the amount imputed to her by the trial Court in this matter. Appellant submitted a sworn financial statement which she used to support her efforts to secure an

"Undertaking On Appeal", filed July 14, 2009, wherein she claims post trial wages from the Powell Family Trust: June 2005 thru June 2009, in an amount of $171,500. That amount, divided by the relevant time period covered, together with the 10% monthly rental income the Appellant is entitled to as reflected in her Exhibit 22, equals a monthly gross income of $3,802.17. It should be duly noted that the amount the trial Court imputed and in which Appellant brings before this Court on appeal is likely the same amount Appellant continues to earn from the Trust for her services, even to this date, well over a year and half one half after the trial in this matter. (*See* R. 2024, Statement of Assets and Liabilities (As of June 30, 2009) (*See* Appellant's exhibit #22 10% Rents 8/01/2001).

II. Issue : The Trial Court Did Not Commit Reversible Error When it Chose Not To Deduct $27,207.59 from Appellants Earnings.

The Appellant would have the Appeals Court once again (as attempted in Issue I above) force the lower Court to adopt Appellant's desired "evidence" over compelling and credible contrary evidence. The record is clear that the lower Court's Findings were not clearly erroneous when it found that Appellant's testimony was simply not believable as to receipt of $27,207.59 from the Trust as compensation.

We once again have to go to Appellant's undated, unsigned, handwritten Exhibit #22 to analyze this claim. The last page of this exhibit included a computer printout allegedly from a Trust agent (which Appellant controlled) of

alleged payments the Appellant claims she received from the Trust during the same time period she was contending (for over three years) she was not employed, not owed wages of any kind, and in fact any monies she received from the Trust were "gifts". Now that she has been found to have been lying all this time, she wants to force the lower Court to adopt her unsubstantiated rewriting of history. Exhibit #22 is nothing more than a self serving, uncorroborated, faulty, and unreliable document (or more precisely set of documents) that Appellant created on the eve of trial to try and reduce her damages when it became apparent her scheme to hide her compensation from the Trust in the amount of over $300,000 was going to be exposed.

The Appellant spends substantial time trying to extrapolate from the findings, new facts that would alter the outcome of the Decree. "To succeed in its challenge to findings of fact, [appellant] may not simply ***reargue*** its position based on selective excerpts of evidence presented to the trial court." ProMax Dev. Corp. v. Mattson, 943 P.2d at 255 (Utah 1984). Appellant cannot re-write history, nor can she erase it. Appellant puts forth a lengthy and elaborate effort in trying to convince this court that she did not have the ability to understand common logic, let alone articulate in words her response(s) when questioned about her duties as co-trustee to the family Trust. And yet, Appellant would have this Court believe that she could re-construct a detailed spread sheet of the hours that she worked for the trust, and that she could recreate a document that claims to have

"disbursements" from the Trust. Not one of the disbursements were supported with any negotiated transaction or copy of item presented for payment. No checks were presented. No proof of deposits was presented. No witnesses of who generated the computer printout were called, and nothing credible was put into evidence that supported the new claim. Exhibit #22 is simply not credible.

The Appellant relies on a footnote mischaracterization in the Court's Findings to try and force the lower Court into a Finding that it clearly did NOT make as to Exhibit #22. The Court said in footnote 5 on page 4 of its Findings, in commenting on the claim that Appellant "alleges" the parties were paid this $27,207.56 as their "combined earnings from services to the Trust", that this is an assertion of Appellant, and that Appellee did not dispute that the amount was consumed by the parties in meeting their marital expenses.

It is true that Appellee did not dispute Appellant's unsupported testimony that the "alleged" amount was consumed, as Appellee had no information to do so. How could Appellee prove to the contrary the funds were never received and were merely made up by Appellant to try and reduce her compensation claim? Remember this claim only came up days before the trial began. That is impossible, other than to simply deny the existence of said funds, and to attack the reliability of the self serving Exhibit #22, which Appellee did quite successfully.

The lower Court agreed in its analysis, and after having referred directly to the claim of Appellant to the offset, in the next paragraph of its Findings, ¶ 14,

it rejected in total the content and claims as asserted in said Exhibit. The lower Court considered the proffered evidence, and simply chose not to give it any weight. That is clearly in the purview of the lower Court, who listened to all the witnesses and reviewed all the documents and evidence submitted and made a well reasoned decision on the evidence. To try and extrapolate a footnote into clear error is again without merit and support. "An appellate Court will not reverse the findings of fact of a trial Court sitting without a jury unless they are. . . ***clearly erroneous***." (quoting MacKay v. Hardy, 896 P.2d 626, 629 (Utah 1995). Moreover, in those instances in which the trial Court's findings include inferences drawn from the evidence, the findings will be upheld unless the logic upon which their extrapolation from the evidence was based "is so flawed as to render the inference ***clearly erroneous***." State v. Briggs, (2008) UT 75, ¶11, 197 P.3d 628,631, *quoting* Glew v. Ohio Sav. Bank, (2007) UT 56, ¶18, 184 P.3d 791. The Court clearly found that there was NO offset to its determination of compensation owed to the Appellant by the family Trust.

In support of the lower Court's finding that the parties did NOT receive these funds as compensation for services, Appellee states again some of the relevant facts the Court had available to her at the time:

1. Appellant stated under oath in her deposition that she was not even employed for the years 2000, 2001, 2002, 2003, 2004, 2005, 2006 and to the current date of the deposition. (T 2027 at 142-143, lines 5-25, and 1-15).

2. Appellant stated during her deposition that all monies she had received from the trust for work she had done were "gifts". (T 2027 at 144, lines 1-8).

3. Appellant even went so far as to say she has not received compensation for working for the Trust back to 1998. (T 2027 at 144-145, lines 24-10).

4. Appellant represented under oath in her deposition that she did NOT keep track of her time that she worked for the Trust. (T 2027 at 148-149, lines 20-25 and 1-21, and Exhibit #22).

5. Although initially trying to evade the question, Appellant admitted at trial that she has lied repeatedly in this case to get what she wants. (T 2027 at 164 lines 7-13 the Appellant stated to the Q: "have you lied repeated times in this case, Ms. Richins, - repeated times, numerous times, to get what you want? A: "Yes").

6. The Court found that Appellant's testimony utterly lacked credibility and should be given weight only to the extent there was corroborative evidence to support it. (Findings of Fact, Conclusions of Law and Order at ¶10).

7. Appellant testified that she is a co-trustee for the Helen Powell Family Trust. (T 2027 at 94, lines 18-20).

8. Appellant testified when asked how many years she had been a trustee that she didn't know for sure, stating "I don't . . . six year, seven, I don't know". (T 2027, at 151, lines 7-9).

9. Appellant testified that she didn't know what agreement was made as far as payment to her from the trust. "I don't really know it ..." (T 2027 at 127 line 25).

10. Appellant testified that she has authority to write checks from the Trust bank accounts. (T 2027 at 153, lines 4-9).

11. Appellant testified that as co-trustee she did *not* keep a contemporaneous record of the time she worked for the Trust. (T 2027 at 148, lines 20-25, T 2027 at 149, lines 1-3).

12. Appellant testified that she had to *re-create* records in order to submit a claim to the Trust as reflected in her personally manufactured Appellant's Exhibit #22. (T 2028 at 237, lines 8-10).

13. Appellant submitted two separate Financial Declarations to the Court, neither of which described or listed her claim to wages owed from the Trust, among other glaring omissions and misstatements under oath. (*See* Pet. ex. 59, Resp. ex. 33).

14. The court found that although Petitioner had control of the Trust and could have paid herself for her services during the time they accrued, Appellant

chose not to withdraw those funds but to shelter them in the Trust as unrecognized income". (*See* F. of F. P. 5 ¶15).

15. Appellee testified contrary to Exhibit #22 that he in fact disputed the accounting of Appellant for hours worked for the trust, and stated contrary to Exhibit #22 that he in fact did NOT get paid according to the representations in said exhibit. (T 2028 at 387, lines 2-25 to T 2028 at 388, lines 1-5).

16. The Court found that although Petitioner is technically a co-trustee of the Trust (with her mother), the evidence before the Court strongly suggested that Petitioner had exercised full control over the Trust's assets and had used the Trust structure in whatever manner she deemed most beneficial to her personal interest. (*See* F. of F. ¶18).

17. Moreover, Appellant's Exhibit #22 contending receipt of $27,207.50 in compensation from the Trust was only manufactured by the Appellant in anticipation of trial, its foundational basis in fact denied repeatedly by Appellant under oath throughout the three year discovery time period.

18. Exhibit #22 was presented to Appellee on the eve of trial, after all witnesses and trial preparation had been basically completed.

19. Exhibit #22 was admitted into evidence to show how Appellant came to the conclusions and amounts she wanted the Court to adopt as to her hidden compensation.

She presented NO evidence [4] to corroborate the document other than her own testimony.

Exhibit #50, the letter from the attorney for the Trust, states *"I have reviewed with my client, Helen M. Powell (the mother of Appellant), the claim in the amount of $118,699.44 that you submitted on behalf of Rita Richins (Appellant). Helen confirms that Rita did a lot of work for her and Helen felt that the hours listed for Rita of 10,809.33 hours was reasonable for the time period listed from August 2000 through May 10, 2005."* No independent analysis was presented, no additional corroborative evidence provided, and nothing is stated in the letter to give credibility to the claim. In fact, the Trust would be unable to support the "accounting and claims" because there were no records kept according to its own trustee. The Trust was faced with the reality of having to pay a potential claim of over $300,000 (as the Court determined thereafter based on the more credible evidence) and jumped at the opportunity to agree to pay approximately one third of that amount. This letter also comes from the Trust's own counsel, of which Appellant as trustee of the Trust managed as part of her duties for the Trust.

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[4] She did NOT present a witness from the Trust. She did deliver a letter from the Trust counsel (Exhibit #50) dated July 28, 2008, less than one week before the first day of trial that in NO way provides any proof of the content of Exhibit #22, but merely states to the effect that the Trust acknowledges the claim made by Exhibit #22.

No discovery was conducted in relation to Exhibits #22 or #50, and all prior discovery was in contradiction to the very premise and alleged factual basis of both exhibits. There is nothing mentioning this claim in her Docketing Statement regarding the $27,205.50.

There is simply no credible evidence to corroborative Appellant's "re-creation" of the alleged wages she now claims to have earned, nor the page where she for the first time alleges that she did in fact get paid for some of her services in the amount of $27,207.56.

There is no credible evidence of any kind to support Appellant's claims that $27,207.50 in wages were ever paid to either party. When questioned by the Court if he [Appellee] ever received payments of check, cash or any negotiable instrument for wages from the Trust Appellee responded "No". (T 2028 at 387 line 18 at 388 line 4). Appellant's testimony gives cause for the Court to question the validity of Exhibit #22, as Appellant has admitted to lying under oath, ". . . to get what [she] want[s]". (T 2027 at 164 lines 9-13) (*See* also, F. of F. and Conclusions Of Law, ¶10).

In fact, in Appellant's Brief on Appeal she admits that the accounting of Exhibit #22, even in the light she is attempting to use it, is unreliable and the computation almost impossible. In her footnote #14 on page 26 of her brief, it is clear that Appellant herself is unable to make the calculations square up. The evidence is so unreliable that the Court reasonably decided to simply give no

weight to said Exhibit #22 and claim, and to instead believe the Appellant's pre trial position of the monies (if any) being "gifts". It is clearly not erroneous to do so under the facts. It is not wise to second guess the fact finder in a situation where there are so many red flags on a single piece of "evidence".

Even a cursory review of the content of Appellant's Exhibit #22 shows how unreliable and faulty it is. The Appellant presents her alleged "recreated" time sheet for the year 2001, more specifically March 4, 2001 to April 7, 2001 which is a five week period. In that five week period, Appellant's accounting that forms the basis for her claim of compensation indicates she worked 24 hours a day, 7 days a week for 5 straight weeks. Out of the 35 days only 3 days have less than 24 hours claimed. Appellant claims she worked a total of 702 hours for March, 2001, which if the court accepted her hourly wage of $12.00 per hour, would total $8,424 for the month.

There is no clear error in this Finding. "[W]e review the trial court's findings of fact for clear error, reversing only where the finding is against the clear weight of the evidence, or if we otherwise reach a firm conviction that a mistake has been made." ProMax Dev. Corp. v. Mattson, 943 P.2d 247, 255 (Utah Ct. App. 1997).

III. Issue: The Trial Court Did Not Commit Reversible Error When it Awarded the Appellant Her Unpaid Wages as Part of the Division of Marital Assets.

The trial Court properly imputed compensation from the Trust to Appellant. Even the Appellant, finally, on the eve of trial admitted that she was entitled to compensation from the Trust; she only disputed the amount and time frame. The evidentiary battle ensued on those issues, and Appellant lost. The Court heard both sides and made an informed ruling. The Court stated *"Therefore, it is fair and appropriate to impute $312,740 in unrecognized income to Appellant for the period July 1998-May10, 2005,* ***rather than*** *to accept the $118,700, that she and the Trust have acknowledged to be a Marital asset"*. (*See* Findings of Fact Conclusions of Law and Order ¶15, emphasis added). The Court clearly considered all points of view.

The contention Appellant pursues in this part of her Appeal is the premise that the Court committed clear error when it awarded Appellant, as part of her equal split of the marital assets, the compensation claim she has against the Trust, of which she is a co trustee. Appellant claims that the compensation owed by the Trust is not "liquid", and therefore the Court committed reversible error when it treated the asset as "fully liquidated" when dividing the marital estate. The Court did not treat the asset as "fully liquidated" and explained its reasoning clearly as stated previously that the asset is not illiquid. This division of assets is one that should not be interfered with given the lower Courts better view of how assets should be divided under the circumstances.

The Appellant foresaw the ruling at trial on this asset, and argued the liquidity issue there. In fact, the lower Court specifically addressed the concerns and position of the Appellant in its Findings at ¶s 16 and 18. At ¶ 16, the Court acknowledged *"Petitioner offers two reasons for why she believes it would be unfair to credit Respondent (Appellee) with half of the value of her deferred income:...(2) because the Trust does not have sufficient liquid assets to pay Petitioner (Appellant) in a lump sum. Petitioner urges the Court to discount the debt because of the "risk" that she may not be able to collect the full amount from the Trust. The Court finds that Petitioner's arguments have little merit".* Findings at page 5, ¶ 16. Although this was an effort to reduce the value of the compensation, the logic surely is the same and the analysis as well as to the distribution of the asset.

At ¶ 18 of its Findings the lower Court made it clear that the evidence supported her distribution of the marital estate so far as the deferred compensation claim. The Court stated, *"As to the "risk" of not collecting on the unpaid earnings, although Petitioner is technically a co-trustee of the Trust (with her mother), the evidence before the Court strongly suggests that Petitioner has exercised full control over the Trust's assets and has used the Trust structure in whatever manner she deemed most beneficial to her personal interests".* The Court finds further, *"Indeed, according to Petitioner's own testimony, during the same time she was deferring payments to herself from the Trust* ***for her services,***

she was paying herself and her siblings $500 per month as ***gifts*** *from the Trust."*

On further review of the evidence the Court went on to find that *"She has presented no corroborative evidence to support her claim that during the relevant time period the Tust was so illiquid that it could not pay her for the services. To be sure, Petitioner's exhibit 50, a letter dated* ***July 28, 2008****, states that the Trust* ***presently*** *lacks enough "liquid" assets to retire the admitted Trust's financial obligation to Petitioner. However, nothing in that letter addresses the Trust's inability during the relevant period (1998-2005) to pay the amounts it owed".*

The Court then concluded most appropriately, *"Indeed, it is evident from the gifts paid out during that period (together with rents collected from Trust properties) that there were liquid assets available to the Trust at the time. It is also clear from the testimony at trial that the Trust presently owns a number of other assets that could be sold to retire that obligation".* Then, referring to the rest of the marital estate which in total had a net value of several hundred thousand dollars, the Court stated, *"Moreover, that is not the only option available. Because these parties have considerable other asserts to their name, there is always the option of offsetting the value of Respondent's share of imputed income from the Trust against other assets of the parties".(See* Findings, ¶ 18).

A valuation or distribution issue is reviewed under a ***clearly erroneous*** standard of review. Stonehocker v. Stonehocker, 2008 UT App 11, ¶44, 176 P.3d

476 ("We defer to the trial Court in its findings of fact related to property valuation and distribution. *See* Howell v. Howell, 806 P.2d 1209,1211 (Utah App. 1991) "Findings of fact in divorce appeals are subject to the clearly erroneous standard of review such that due regard shall be given to the opportunity of the trial Court to judge the credibility of the witnesses." (internal quotation marks omitted).

"We afford the trial court considerable latitude in adjusting financial and property interests, and its actions are entitled to a presumption of validity." Leppert v. Leppert, 2009 Utah App 10, ¶ 9, 200 P.3d 223.

"Accordingly, changes will be made in a trial court's property division determination in a divorce action only if there was a *misunderstanding* or *misapplication* of the law resulting in ***substantial and prejudicial error***, the ***evidence clearly preponderated against*** the findings, or such a serious inequity has resulted as to manifest a ***clear abuse of discretion***. Davis v. Davis, 2003 Utah App 282, ¶ 8, 76 P.3d 716. (emphasis added).

Trial courts have considerable discretion in determining . . property distribution in divorce cases, and [their decisions] will be upheld on appeal unless a ***clear and prejudicial abuse*** of discretion is demonstrated". Stonehocker v. Stonehocker, 2008 Utah App 11, ¶ 8, 176 P.3d (omission in original). (emphasis added).

"To succeed in its challenge to findings of fact, [appellant] may not simply ***reargue*** its position based on selective excerpts of evidence presented to the trial court." ProMax Dev. Corp v. Mattson, 943 P.2d at 255.*See* Newmeyer v. Newmeyer, 745 P.2d 1276, 1287 (Utah 1987) (giving trial court broad latitude in dividing Marital estate).

The Appellant takes the untenable position that she is being punished because she was awarded her compensation claims against the Trust she controls in the division of marital assets. The reason this seems not genuine is because the Appellant now states to the effect, shame on you for believing me when I lied for over three years in the litigation about compensation, and now that I am found to be entitled to compensation, you should not make me be the responsible party to collect same.

Appellant interestingly enough in her argument takes the position that the fiduciary duty she may have under the law prevents her from doing what she has been doing with this Trust's assets for years. To use this as a defense is to ask this Court to allow her to use her alleged duties to prevent her from facing the consequences she caused by her previous violation of those very duties. This argument alone is reason enough to award her the asset. Who better to collect against her own Trust? With the contrary and "flip-flopping" positions taken by the Appellant under oath as to the issue of compensation owed her by the Trust she manages, to require the Appellee to collect this asset would be nonsense.

Appellee would be saddled with the task of trying to prove facts that have been intentionally withheld from him, distorted, and stated to be 180 degrees opposite in some cases. It was the decision of the Appellant to defer her income, lie about it, hide it even when under oath, and try to manipulate the Court to find an amount due of approximately 1/3 of the truth. To ask the Appeals Court to require Appellee to try and sort this out is not supported by the facts, fairness, common sense, nor logic.

It is helpful to consider the previous stated facts in this brief in determining whether the Court's decision on the distribution of the marital estate assets was clearly erroneous. The Appellee has stated several facts above, and rather than repeat them again, merely asks the reader to review them in consideration of the Court's finding that Appellant, not Appellee, should be awarded the compensation claim against the Trust she controls.

In Appellant's third post trial attempt in her Motion To Stay Pending Appeal, she incorporates her Statement of Assets and Liabilities as of June 30, 2009. (*See* R. at 2023-2024) This statement includes a substantial previously undisclosed asset (a personal injury claim against the Trust for several hundred thousand dollars that clearly existed at the time of discovery and trial). Appellant now has a total claim against the Powell Trust and Helen Powell for $590,300 and declares her total net worth at approximately $750,000. This is a further reason this Appeals Court should not disrupt the property distribution of the lower Court.

The dishonest actions of Appellant have complicated the very asset she endeavored to hide.

It should also be noted when reviewing the issue on appeal as to the liquidity of claims against the Trust, that under Liabilities on Appellant's Financial Statement she lists a loan from Helen Powell for $50,000, which Appellant has not paid back and testified that it could be applied to wages earned, from the Trust. (*See* R. at 2024) (T 2027 at 251 line 21 at 252 line 8).

Also represented on a Financial Statement is an entry for $70,000 from the Powell Family Trust for "advances against claims". It appears that Appellant continues her efforts to hide her compensation by taking "loans" from the Trust rather than compensation so as to avoid taxes, and of course to continue the lies she has stated that she is not entitled to any income.

She now has received $120,000 in cash from the Trust that common sense would tell us was to reduce the debt the Trust owes her. The Trust agreed it owed her no less than $118,000, and has seemingly paid her more than that already. The argument on the liquidity of the claim against the Trust is suspect given these facts. It is clear that Appellant is not concerned about her fiduciary duties and continues to take loans from the Trust she manages, all while she claims that same Trust owes her almost $600,000. (*See* R. at 2023 – 2024).

In Exhibit #50, the letter dated July, 2008 from the as attorney for the Trust used in support of Appellant's claim for compensation, the attorney states, "*Helen*

does not have enough liquid assets at the present time to immediately pay the entire $118,699.44. However, she will work with her accountant to pay what she can now and then she will pay the balance to Rita as soon as she can convert some of her fixed assets into cash. Please be patient with my client for a few months while she obtains the rest of the funds she will need to pay the balance she owes to Rita". (*See* Exhibit #50).

It is clear that the Trust has some liquidity (at least back in July 2008 when this letter was written), and that it has sufficient assets to become more liquid within only a few months of July 2008 (almost 2 years ago now) by converting some assets into cash. Appellant is the trustee of this Trust and although she tries to fashion Exhibit #50 as an independent letter from the Trust, common sense would dictate that she continues to control the Trust and is trying to delay once again her compensation to bolster this Appeal. Why would a Trust properly managed by an independent person not tell a claimant who is requesting money for services that loans to that person in the amount of $120,000 should not be applied to the debt? The liquidity claim fails on its own lack of merit.

IV. Issue: The Decree of Divorce Entered in this Case is Not a "Punitive" Decree and is Not Contrary to Utah Law.

Appellant frames the issue of punitive decree as a question of law to avoid the marshaling requirement. In doing so, however, she fails to take advantage of the opportunity that marshaling provides; to take a second look at the issue in light

of the broad deference owed to the fact finder at trial. Consequently, the issue raised is not meritorious, because it is not discussed in light of the controlling case law or the controlling standards of review. All facts as set forth herein need to be considered in the global issue of determining a so called "punitive Decree".

Since Appellant claims the "effect" of the Decree is what is punitive, the Court must remember that "We afford the trial court considerable latitude in adjusting financial and property interest, and its actions are entitled to a presumption of validity." Leppert v. Leppert, 2009 UT App 10, ¶ 9, 200 P.3d 223 (quoting Davis v. Davis, 2003 UT App 282, ¶8, 76 P.3d 716).

> "Accordingly, changes will be made in a trial court's property Division determination in a divorce action only if there was a misunderstanding or misapplication of the law resulting in substantial and prejudicial error, the evidence clearly preponderated against the findings, or such a serious inequity has resulted as to manifest a clear abuse of discretion." (internal quotation marks omitted).

The Court went to great lengths to produce a detailed accounting of the distribution of marital assets in the Decree, entered April 15, 2009. A review of the Decree makes it clear that both parties received an equal amount of the marital assets following the trial of this matter. There is absolutely no evidence inferred or otherwise to claim the trial Court's findings and distribution of assets under the Decree are "punitive" to either party. There are no damages awarded to infer the Court's findings were based on bad faith, malice, fraud, violence or evil intent and no inference designed as a deterrent for future actions of either party. Appellant

cannot claim the Decree is punitive simply because she *feels* the Decree is unfair to her.

Appellant has tried to manipulate the trial Court's figures to manufacture and conjure up an appearance of a disproportionate award of marital assets. Appellant's mathematical assumptions are contrary to the trial Court's Findings and the Decree, and cannot be used to support her claim that the Decree is not fair and just as to both parties. A quick example of this is the Appellant's statement at page 40, the last paragraph, wherein she states that she was awarded "$191,171.35 in marital assets" compared to the Appellee being awarded "$380,372.83, which is 66.55%". This is a statement that flies in the face of the clear reading of the Decree and the 50/50 allocation of marital assets set forth therein. In order to support this math, one would have to assume (among other things) that ALL of the deferred compensation awarded Appellant is worthless. The Appellant completely disregards the award of compensation to her for her wages owed by the Trust. Note that Appellant has already received $120,000 cash in the form of loans from the Trust toward this claim, and she submitted Exhibit (#50) that indicated she would in fact be paid for her compensation claim, no later than a few months after July 2008. We are approaching two years since the Trust itself agreed Appellant would be paid a substantial amount! How can appellant now state to this Court in good faith that she has NO value in the compensation claim awarded to her?

Appellant revisits the alimony issue and the Protective Order [5] issue in discussing her position that the Decree is punitive. The Court merely enforced Appellant's own under oath withdrawal of the alimony claim (and thereafter Appellant's prevention of discovery on the underlying facts). It is interesting to note that the Appeal herein does NOT claim the Court committed error in taking such action. Alimony is not being appealed, yet it is being stretched beyond recognition as somehow relevant to the fact that the Court was punishing the Appellant. If this were the case, she surely would have appealed the alimony issue. There never was any legitimate alimony issue in this case and Appellant finally recognizes the same by not appealing the Court's ruling thereon.

"The Appellate Court will not re-weigh the evidence, but view evidence that supports the trial court's decision in the light most favorable to the trial court's findings. The broad discretion accorded the trial court in making findings, particularly in the context of a divorce proceeding, simply acknowledges that the trial court is seeking to make an equitable distribution of the marital estate and that the trial court is best suited to weigh the evidence because "the trial judge has

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[5] As to the Protective Order, the record needs to be set straight. Appellee was asked at trial if there was any domestic violence that took place. He answered "No", because there wasn't any. Appellee was originally charged with D.V. but was able to prove Appellant lied on the police report to obtain a Protective Order to have him removed from his home that he had owned for 8 years prior to the party's marriage. All Domestic Violence (D.V.) charges were dropped against Appellee, including simple assault DV and damage/interruption of a communication device. The only charge he pled guiltyto and was charged with is one class C misdemeanor charge of disorderly conduct under §76-9-102.

observed the facts, such as a witness's appearance and demeanor, relevant to the application of the law that cannot be adequately reflected in the record available to appellate courts." Jeffs v. Stubbs, 970 P.2d 1234, 1244 (Ut 1998) quoting State v. Pena, 869 P. 2d 939 (Utah 1994).

The Appellant admits that the Decree is not punitive on its face. Instead the Appellant claims the "effect" of the Decree is so harmful to her that it is punitive and that the lower Court judge must have meant to punish her. The only way this argument holds any substance at all is if the Appellant prevails on her other appeal issues herein. Accordingly, Appellee incorporates his argument and facts on the other issues herein to support the trial Court's ruling.

Appellant, as shown herein, has simply ignored the Findings of the Court herein. The trial Court had the arduous task of being fact-finder in this case wherein the difficulty of every issue resulted from the actions of Appellant and her propensity to lie. The lower Court literally left no stone unturned in her search of truth in this case. Even when, at the eve of trial, Appellant finally admitted that the Trust did indeed owe her money, when throughout the litigation she adamantly denied any such claim, the Court could have concluded that Appellant was actually hiding assets. The trial Court could have in fact done more to reach an equitable result under the circumstances and awarded the Appellee more of the assets to compensate him. After all, Appellant intentionally failed to disclose her claim to wages as an asset, and intentionally took efforts to hide that fact causing

this case to even go to trial at all. The modest award of a partial amount of attorney fees to Appellee at the trial level, when Appellee sought substantially more, clearly indicates the Court did not punish Appellant.

After recognizing Appellant's inappropriate conduct with regards to her misrepresentations, fabrications and lies under oath in depositions, and in a court of law, her counsel now *infers* that the trial Court may have ruled against Appellant to punish her. The trial Court did not make any indication that the Findings were anything but a fair and equitable distribution.

"When reviewing a bench trial for sufficiency of the evidence, we must sustain the trial court's judgment unless it is '***against the clear weight of conviction*** that a mistake has been made.' State v. Gordon, 2004 UT 2, ¶5, 84 P.3d 11167 (quoting State v. Goodman, 763 P.2d 786, 786-87 (Utah 1988) (quoting State v. Walker, 743 P.2d 191, 193 (Utah 1987) (emphasis added).

The plain error exception enables the appellate court to "balance the need for procedural regularity with the demands of fairness." State v. Verde. 770 P.2d 116, 122 n.12 (Utah 1989). At bottom, the plain error rule's purpose is to permit us to avoid injustice. "State v. Eldredge, 773 P.2d at 35 n.8. To demonstrate ***plain error***, a defendant must establish that "(i) [a]n error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the

appellant, or phrased differently, our confidence in the verdict is undermined. "State v.Dunn, 850 P.2d at 1208-09 (Utah 1993).

CONCLUSION

The trial Court did not commit error as to any of the issues Appellant raises and there is ample evidence in the record to sustain the trial Court's Findings and Conclusions. Taking into consideration the facts and circumstances of this case, the trial Court's ruling implements an equitable division of the marital estate. The Appellant was awarded over $200,000 cash in October 2005 under a temporary Order in the case. She was awarded the monies she had received under the Decree, and she was awarded the $120,000 in cash "loans" that she could, and probably already has converted to her ownership as a result of an admitted claim for compensation against the Trust. There is simply no punitive aspect to this case whatsoever. To claim that it is punitive for the Court to point out the credibility issues in a trial is confusing. This case turned on credibility, and the Appellant must take responsibility for her actions.

Appellee requests Attorney Fees and Costs for the frivolous issues pursued on appeal. Appellee requests an award of attorney fees and costs under Utah R. App. 33 and 24 for Appellant pursuing a frivolous appeal. A frivolous appeal includes "one that is not grounded in fact, not warranted by existing law, or not

based on a good faith argument to extend, modify, or reverse existing law." Utah R. App. P. 33(b); *see* also Porco v. Porco, 752 P.2d 365, 369 (Utah App. 1988)

The Utah Court has found, "when a party who received attorney fees below prevails on appeal, the party is also entitled to fees reasonably incurred on appeal." Valcarce v. Fitzgerald, 961 P.2d 305, 319 (Utah 1998).

Based on the well reasoned rulings of the trial Court, the Decree of Divorce entered should stand. The Appellant has failed in her attempt to show that the Court committed reversible error when it imputed $3,800 of unpaid earnings, chose not to deduct any wages or income the parties "allegedly" received from the Trust, and awarded the compensation asset to Appellant. There is no Punitive Decree. Based thereon, this Appeal should be dismissed and Appellee awarded his fees and costs to defend same.

DATED this 22nd day of April, 2010.

TOM D BRANCH, LLC

Tom D Branch
Attorney for Respondent/Appellee James E. Richins

CERTIFICATE OF SERVICE

I hereby certify that one (1) original and seven (7) true and correct copies of the foregoing BRIEF OF APPELLEE was mailed, first class mail, postage prepaid, to the following on this 22nd day of April, 2010:

UTAH COURT OF APPEALS
450 SO. STATE ST.
P.O. BOX 140230
SALT LAKE CITY, UT 84114

I also certify that two (2) true and correct copies of the foregoing BRIEF OF APPELLEE were mailed, first class mail, postage prepaid, to the following this 22nd day of April, 2010:

DAVID A. MCINTYRE
J. DAVID MILLINER
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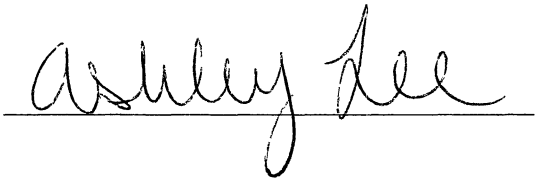

ADDENDUM

Decree of Divorce

Findings of Fact, Conclusions of Law and Order

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
SALT LAKE DEPARTMENT

RITA Y. RICHINS, Petitioner,	:	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
vs.	:	
JAMES E. RICHINS, Respondent.	:	Case No. 054902600
	:	Judge Denise Posse Lindberg

¶1 A bench trial was held in this case on August 4 and 5, 2008. Petitioner was present and represented by her counsel, Mary Paxman McGee. Respondent was present and represented by his counsel, Tom D. Branch. The Court heard testimony and received exhibits offered by both parties, and took the matter under advisement. After review of the testimony and exhibits the Court now enters its

FINDINGS OF FACT

¶2 At the time this divorce Petition was filed, the parties had been residents of Salt Lake County for at least three months prior to filing. Complaint, at ¶1, Answer, at ¶1.

¶3 The parties began cohabiting in May or June, 1982, they were married on May 26, 1984. The parties have no children in common.

¶4 The parties separated on May 10, 2005; Petitioner filed her Petition for Divorce on May 12, 2005 alleging emotional and physical abuse.[1]

[1]As a result of an incident that occurred on or about May 10, 2005, Petitioner obtained a Protective Order against Respondent on May 25, 2005. Concurrently, Respondent was charged with two misdemeanor domestic violence charges: Simple Assault (DV) and Damaging/Interrupting a Communication Device. On September 1, 2006, Respondent entered a plea to an amended misdemeanor count of Disorderly Conduct (DV). At sentencing on September 11, 2006, Respondent received a fine of $500 which was suspended upon proof of completion of 75 hours of community service. He was also ordered to undergo an alcohol and drug evaluation and a domestic violence evaluation and to comply with all recommendations

¶5 On or about October 14, 2005, the parties entered into a Stipulation concerning the partial distribution of marital assets, the terms of which were read into the record before Commissioner Casey. The terms of the stipulation were reduced to writing and entered as temporary orders by this Court on October 27, 2005.

¶6 Following extensive pretrial motions the case was certified for trial by Commissioner Casey on November 28, 2007 on the following issues:

- The validity of Petitioner's waiver of alimony.
- Petitioner's request to have the Decree enter on the grounds of physical or emotional cruelty based on past domestic violence.
- An offset or credit sought by Respondent based on his claim that Petitioner had sheltered certain assets (i.e., compensation earned over several years for managing a family trust) for the purpose of making those assets unavailable to Respondent.
- Division of marital assets.
- Respondent's request to have the existing protective order dismissed.
- Each party's request for attorneys fees.

Validity of Alimony Waiver

¶7 In her Petition for Divorce Petitioner initially requested alimony. In subsequent proceedings Petitioner disclaimed the alimony request, and based on that disclaimer Petitioner successfully resisted Respondent's efforts to conduct discovery about her financial status. Thereafter, Petitioner reasserted her alimony request. This Court ruled that Petitioner had waived her alimony claim. Minute Entry of May 15, 2008. Nevertheless, at trial Petitioner sought to proffer grounds in support of a renewed claim. Petitioner has provided no facts that would justify a change to the Court's prior rulings. No material facts have changed since the last time the Court addressed this issue.

Petitioner's Request to Enter Divorce Decree on the Basis of Fault

¶8 In the Divorce Petition filed May 12, 2005, Petitioner requested that the Decree enter on grounds of "irreconcilable differences." Since then, however, Petitioner has modified her position and now insists that the Decree be entered on the basis of Respondent's "fault." Petitioner has a couple of related hurdles to overcome in pursuing fault-based grounds. The first issue is that Petitioner never sought leave to file an Amended Petition seeking relief on those

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from the evaluators. Respondent was placed on unsupervised, good conduct probation to the court for 12 months. Petitioner's Ex. 1.

grounds.[2] The second issue is that the DV incident upon which she relies for her present position had just taken place a couple of days earlier, yet it was not referenced in her Petition. Petitioner has not explained why it is now so critical that the Decree enter on those grounds, even though they have never been explicitly pled.

¶9 Issues of fault are most relevant in the context of adjudications involving alimony and child custody. Neither of those reasons apply here because Petitioner waived any alimony claim and the parties have no children in common.

¶10 Although Respondent's conviction in a domestic violence-related count could support entering a fault-based Decree, there is plenty of fault attributable to *both* parties. In addition to the DV conviction, Respondent has acted wrongfully at other times, such as when he emptied out various marital bank accounts within days of the parties' separation. For her part, Petitioner has also acted wrongfully. Specifically, Petitioner has knowingly and repeatedly lied in her Court filings (*e.g.*, her financial declarations) and during her depositions.[3] Through cross-examination at trial Petitioner's testimony was repeatedly shown to have been untruthful and evasive. Not only has Petitioner lied in the context of these proceedings, at trial Petitioner was forced to admit to lying numerous times in various other contexts (*e.g.*, to Ford Motor Credit in order to qualify for a car loan, to the Salt Lake City Credit Union in an account application) in order "to get what [she] want[s]." As a result, the Court finds that Petitioner's testimony utterly lacks credibility and should be given weight only to the extent there is corroborative evidence to support it. Therefore, if Petitioner insists on a fault-based divorce, the Court finds that fault should be equally assigned to both parties. Alternatively, the Decree should enter on grounds of irreconcilable differences as pled in the Petition.

Respondent's Request for Offset/Credit on Distribution of Assets on Basis that Petitioner Hid Marital Assets in the Family Trust She Controls.

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[2]To be sure, as referenced at note 1, *supra,* there has been at least one documented incident of domestic violence during the parties' marriage. That incident, which took place on or about May 10, 2005, resulted in the parties' physical separation and in Respondent's subsequent guilty plea to an amended misdemeanor count of Disorderly Conduct (DV).

[3]Petitioner filed two financial declarations, one dated January 31, 2006, and the other dated September 14, 2007. In these filings Petitioner declared, under penalty of perjury, that she had no income, no employment, and no debt. In the 2006 declaration she also stated that she had no bank accounts, although in the 2007 she lists a number of accounts that had existed at the time she filed the 2006 declaration. In neither statement did she acknowledge what she subsequently admitted at trial–that she has a viable claim against her family Trust for approximately $118,700 in past wages. In her depositions Petitioner had denied any right to wages from the Trust, and further testified that the information in the financial declaration was accurate. At trial, however, Petitioner was forced to admit that most, if not all, of her representations in those financial declarations were untruthful.

¶11 Respondent contends that Petitioner has "earned over $45,000 per year since 1995 and hidden that money in the Powell Family Trust" (the "Trust") by declining to receive payment from the Trust that she manages as co-trustee with her mother. Respondent requests that the Court impute and recognize that income and credit him with "an amount equal to his equitable share in Petitioner's hidden income when the Court divides the estate." Respondent's Trial Brief, at 7. Specifically, Respondent asks that the Court impute to Petitioner income or assets in the amount of $399,200 for her work managing the Trust.

¶12 The parties disagree as to when Petitioner began working for her family's Trust. Petitioner claims she did not begin working for the Trust until 2000, Respondent claims she began in 1995. For the reasons stated hereafter, the Court imputes Trust employment to Petitioner from at least July 1, 1998.

¶13 In support of her position Petitioner offers Petitioner's Ex.22. Petitioner alleges that this undated, unsigned, handwritten exhibit reflects the hours she worked for the Trust between *August 2000* and May 10, 2005.[4] According to the exhibit, during that period Petitioner worked a total of 10,809.33 hours on behalf of the Trust at a rate of $12.00 per hour, resulting in earnings to her of $129,711.96. Petitioner further claims that during that same period Respondent performed 259 hours of work on behalf of the Trust (also at $12.00 per hour), for a total of $3,108.00 in earnings to Respondent. As reflected in the exhibit, Petitioner alleges that of the parties' combined earnings from services to the Trust, they were paid $27,207.50.[5] If Petitioner's contentions are accepted, it is evident that Petitioner has failed to collect $105,612.46 for hourly work she performed on behalf of the Trust. But this is not all. Petitioner has also acknowledged that another part of her compensation was a "management fee" of 10% of rents collected from properties owned by the Trust. According to the exhibit, that results in another $13,086.98 in unpaid compensation to Petitioner. In total, Petitioner now concedes that the Trust she manages is holding at least $118,699.44 in compensation due to her and which she has chosen not to collect.[6] She also acknowledges this is a marital asset. Finally, the Trust has acknowledged in writing the debt owed to Petitioner. Petitioner's Ex. 50.

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[4]At trial Petitioner acknowledged that she did not keep contemporaneous records and that this exhibit is a reconstruction based on other records available to her.

[5]Petitioner asserts, and Respondent does not dispute, that this amount was consumed by the parties in meeting their marital expenses.

[6]It is undisputed that the Trust documents authorized payment for compensation of trustees who work for the Trust. Nevertheless, through much of the pendency of this case Petitioner adamantly denied, under oath, that she had a compensation arrangement with the Trust. Instead, she asserted that her services to the Trust were in a volunteer capacity to help her parents. Petitioner's belated acknowledgment that she is owed compensation by the Trust did not occur until July 30, 2008–practically on the eve of trial.

¶14 Although Petitioner and the Trust now acknowledge that she has failed to collect $118,699.44 in wages, Respondent contends that the amounts actually owed by the Trust for Petitioner's services is far in excess of that amount. In support of this contention Respondent offers his own exhibit – an application to Ford Motor Credit filed by Petitioner on or about July 31, 2004. Petitioner's Ex. 28. In that application Petitioner listed her occupation as "Estate Manager," the "Powell Family Trust" as her employer, her monthly salary at "$3,800," and her time on the job as "6 years." *Id.* According to this exhibit, Petitioner's documented employment with the Trust began no later than July 1998, rather than in August 2000 as she contended at trial and in her exhibit 22.[7] Whether or not those representations to Ford Credit were truthful, the Court finds that it is fair and appropriate to hold Petitioner to the certification she made in that credit application as an admission against interest. Therefore, the Court finds that during the term of the marriage Petitioner was employed by the Trust for no less than 82.3 months at a gross monthly wage of $3,800 per month, for total gross imputed earnings during that period of $312,740.

¶15 The Court finds that although Petitioner had control of the Trust and could have paid herself for her services during that time, Petitioner chose to not withdraw those funds but to shelter them in the Trust as unrecognized income. In the meantime, she placed in the Trust assets that she used (and continues to use) for her personal benefit. Therefore, it is fair and appropriate to impute $312,740.00 in unrecognized income to Petitioner for the period July 1998-May 10, 2005, rather than simply to accept the approximately $118,700, that she and the Trust have already acknowledged to be a marital asset.

¶16 Petitioner offers two reasons for why she believes it would be unfair to credit Respondent with half of the value of her deferred income: (1) because there will be tax consequences that need to be recognized; and (2) because the Trust does not have sufficient liquid assets to pay Petitioner in a lump sum. Petitioner urges the Court to discount the debt because of the "risk"that she may not be able to collect the full amount from the Trust. *Id.* The Court finds that Petitioner's arguments have little merit.

¶17 As to the tax liability issue, at trial Respondent suggested that the parties were similarly situated financially and that the Court could therefore treat both parties as being subject to a 33%

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[7]At trial Petitioner sought to distance herself from the statements in her application by claiming that her son had prepared and signed the Ford Credit application. Whether that belated assertion is true or not is irrelevant; the fact is that Petitioner acknowledged submitting the application to Ford Credit. Thus, if someone else prepared and/or signed the application, the reasonable inference is that it was done at her direction. Further, by submitting the application Petitioner adopted the representations therein as her own. It is undisputed that Petitioner was the one who received the benefit of the credit secured by that application, and that she used those proceeds to purchase a vehicle which she used. Petitioner has also claimed that she applied to Ford Credit in her capacity as trustee of the Trust, not on her own behalf. There is no indication on the face of the application that would support this contention.

tax liability. Petitioner did not challenge that suggestion or offer an alternative. Accordingly, the Court accepts Respondent's suggestion as a fair and appropriate way to calculate the tax liability on Petitioner's uncollected earnings.

¶18 As to the "risk" of not collecting on the unpaid earnings, although Petitioner is technically a co-trustee of the Trust (with her mother), the evidence before the Court strongly suggests that Petitioner has exercised full control over the Trust's assets and has used the Trust structure in whatever manner she deemed most beneficial to her personal interest. Indeed, according to Petitioner's own testimony, during the same time she was deferring payments to herself from the Trust *for her services*, she was paying herself and her siblings $500 per month as *gifts* from the Trust. The Court does not credit Petitioner's testimony in this regard. She has presented no corroborative evidence to support her claim that during the relevant time period the Trust was so illiquid that it could not pay her for her services. To be sure, Petitioner's exhibit 50, a letter dated *July 28, 2008,* states that the Trust *presently* lacks enough "liquid" assets to retire the admitted Trust's financial obligation to Petitioner. However, nothing in that letter addresses the Trust's inability during the relevant period (1998-2005) to pay the amounts it owed. Indeed, it is evident from the gifts paid out during that period (together with rents collected from Trust properties) that there were liquid assets available to the Trust at the time. It is also clear from the testimony at trial that the Trust presently owns a number of other assets that could be sold to retire that obligation.[8] Moreover, that is not the only option available. Because these parties have considerable other assets to their name, there is always the option of offsetting the value Respondent's share of imputed income from the Trust against other assets of the parties.

¶19 Respondent suggested that the Court also impute interest on Petitioner's undeclared wage income at a "modest" rate of 5% per year.[9] Although Respondent presented no evidence in support of the interest rate he proposed, the Court can take judicial notice of the legal interest

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[8]The evidence before the Court was that in the year 2000, the Trust owned assets worth approximately $3.2 million. Petitioner's trial testimony to the effect that she does not know the worth of the Trust she controls is simply not credible.

[9]At trial, Respondent's counsel made a somewhat different argument regarding wages to be imputed to Petitioner. The numbers suggested by Respondent's counsel in argument include $50,000 in a "forgiven loan," $15,084.00 in value of unaccounted "overtime pay", $10,000 in estimated interest, and a $108,093.30 adjustment to the hourly salary. The Court concludes that Respondent's counsel failed to lay proper foundation for how these numbers were derived. Specifically, Respondent's counsel did not explain the time periods covered by his calculations (i.e, beginning in 1995, 1998, or 2000), the basis for calculating interest, the basis for concluding that Petitioner would be covered by federal overtime pay provisions vs. being salaried "management"personnel, etc. The Court concludes that it will simply rely on Petitioner's representations to Ford Credit for computing years worked and monthly salary.

rates for the relevant period (1998-2005).[10] The yearly-set federal post-judgment interest rate during that period ranged from a low of 3.28% in 2004 to a high of 7.64% in 1998, and averaged 5.5% for the entire period. Therefore, the Court accepts Respondent's suggestion that a 5% interest rate be used to approximate the interest income that would have resulted if Petitioner had timely collected her wages from the Trust.

Valuation of the Marital Estate

¶20 In this case the parties have used the date of separation to calculate other matters involving division of assets and allocation of debt. For example, Petitioner calculated her acknowledged earnings from the Trust only through May 10, 2005. Similarly, Respondent's request that income be imputed to Petitioner only extended through May 10, 2005. Additionally, at ¶22 of the Stipulation Agreement signed by the parties in October 2005 (the "Stipulation"), the parties agreed to "bear sole liability for, and hold the other party harmless from , any debts or liabilities incurred . . .[by them] since the[ir] separation in May, 2005, unless indicted [sic] otherwise in this Stipulation."

¶21 As part of the Stipulation the parties also agreed that any wages earned after the date of separation would be their sole and separate property. Stipulation, at ¶20. Notwithstanding that agreement, Petitioner now argues that this provision does not apply to accruals of pension benefits after that date. She, therefore, makes claim to an equitable share of Respondent's pension benefits through the date the Divorce Decree enters. Petitioner has offered little by way of support for her claim to post-separation pension benefits other than reliance on the general rule that assets are valued as of the time of trial or entry of the Divorce Decree.

Premarital Property and Inheritance

¶22 The parties have stipulated that value of premarital real estate properties held by the parties is essentially "a wash." Therefore, the parties did not present evidence at trial on this issue. The Court finds that the parties have resolved between themselves the issue of the premarital real estate.

¶23 As part of their 2005 Stipulation Respondent received $21,232.56 from the sale of his mother's home, and $19,971.12 from the sale of land owned by his mother in New Mexico. The parties further recognized that Respondent was entitled to those funds as his separate property,

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[10]Each year the United States Government and the Administrative Office of the Courts for the State of Utah publishes the federal *post-judgment* interest rate for that year. For the relevant period (1998-2005). Of course, even though these Under Utah Code §15-1-1(2), the statutory *pre-judgment* is 10%.

together with all interest accrued from those funds.[11] Petitioner disputes and claims a half-interest in $14,213.17 in cash from Respondent's mother's estate. The Court heard testimony at trial regarding these funds and finds that those moneys came from Respondent's mother's account, that no marital funds were placed in mother's account, and that the transfer of funds to the parties' joint account was solely for purposes of distribution to Respondent's siblings as part of settling the mother's estate.

Division of Marital Assets

Cash and Cash Equivalents

¶24 The parties have stipulated that they presently hold, in various accounts, a total of $447,471.94 in marital assets. The money in these accounts should be equitably divided between the parties after adjustments to reflect the awards and offsets discussed in these Findings of Fact.[12]

Marital Residence

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[11]Although Respondent was awarded these inheritance amounts in 2005 under the terms of the Stipulation, he has never received those funds because Petitioner's counsel "froze" the accounts. It is not exactly clear to the Court why three years after the Stipulation these funds have not been distributed to Respondent, but the Court finds that these previously-awarded funds should be immediately released to Respondent. Respondent should also receive all the interest accrued on the funds awarded to him by Stipulation but which have been detained by actions of Petitioner's counsel.

[12]As referenced *supra*, as part of their Stipulation the parties received a partial distribution of marital assets in cash, negotiable instruments, and personalty, valued at approximately $200,000 for each party. The distributions included the following:

Petitioner	Respondent
Certificate of Deposit (CD) valued at $34,960	CD valued at $33,525.07
5-year term deposit valued at $45,168.57	5-year term deposit valued at $45,168.57
1/2 share in CD valued at $221,265.42	1/2 share in CD valued at $221,265.42
1/2 share in a Cyprus CU account ($8,711.14 ea.)	1/2 share in a Cyprus CU account ($8,711.14 ea.)

The parties also stipulated that any difference in the actual dollar value of the CDs awarded to the parties would be taken into account in the final settlement of the marital estate, and Respondent would be entitled to an offset for the difference in the amount. Stipulation, at ¶3.

¶25 Respondent has requested that the Court impute a fair market rental value for the residence in the amount of $1,300 per month, and that it award him one-half of that imputed rental value as a marital asset. The Court finds no basis for doing so. In their Stipulation the parties agreed that Petitioner would be awarded exclusive use and possession of the marital residence during the pendency of the action. Although in their Stipulation Petitioner expressly disclaimed any claim for spousal support and/or alimony during the pendency of this action, the Court construes the provision granting Petitioner the right to use and possess the residence as a form of negotiated "in-kind" spousal support. The Court also finds no merit to Respondent's alternative suggestion that the Court consider the expenditures he incurred in securing separate housing for during the pendency of the action. Because of the protective order that issued as a result of the DV incident in May 2005, Respondent was not allowed to remain in the residence. That protective order remains in place and, as a result, whether or not these parties were divorcing, Respondent would have incurred a separate housing expense.

¶26 At Petitioner's request, the marital residence was appraised in June, 2008, and valued at $186,000. Petitioner has asked that the marital residence be awarded to her with credit to Respondent for his interest in the residence. However, Petitioner argues that the Court should adjust downward the residence's value to account for a "mold problem" in the residence and the cost of remedying the alleged problem.

¶27 The appraiser, Mr. Mulcock, testified that he was asked to consider the cost to remedy the mold problem after he rendered his appraisal. Mr. Mulcock testified that he would amend his appraisal downward by $5,000.00 to account for that problem. The Court accepts Mr. Mulcock's testimony and finds that the residence should be valued at $181,000.00. The Court finds this is a marital asset and Respondent is entitled to his equitable share of that value.

Personalty

Vehicles and Boat

¶28 Based on the Stipulation the parties divided between themselves various items of personalty including a SeaRay boat, which was awarded to Petitioner and valued at $14,900. Respondent was awarded two older Ford trucks (one brown, one red) and a red truck topper. The parties agreed that value on those vehicles would be assessed according to Kelly Blue Book value as of May 2005. Stipulation at ¶¶10,11. Respondent was also awarded the parties' 1992 Northland Camper, at an assessed value of $2,000.00, with the proviso that "Petitioner [would be] entitled to a $2,000.00 offset in the final division of the marital estate." *Id.*, at ¶11. The parties also stipulated that the difference between the value of the boat and the value of the two trucks and the topper would be taken into account in the final division of the marital estate. *Id.*, at ¶14.

¶29 Respondent presented evidence at trial that the Kelly Blue Book "private party" value for the Ford trucks was $3,150 for the Brown Ford truck and $4,350 for the Red Ford truck.

Petitioner did not contest those figures and the Court accepts them as fair representation of the value of those vehicles. Neither side presented evidence on the value of the red "topper" for one of the trucks, so the Court assumes no additional value attributable to it.

¶30 After subtracting the value of the two Ford trucks awarded to Respondent in October 2005, from the $14,900 value of the SeaRay boat awarded to Petitioner at that time, the Court finds that there is a difference of $7,400 in favor of Respondent. Pursuant to ¶11 of the Stipulation, Petitioner is entitled to a $2,000 offset because of the Northland Camper awarded to Respondent. After subtracting Petitioner's offset, the Court finds that Respondent is entitled to a net credit of $5,400 for these items of previously-distributed personalty.

¶31 Respondent has asked the Court to include within the marital estate the value of two vehicles (a 2003 Ford Taurus and a 2004 Ford F-150 truck) purchased with funds from the Trust. In support of his position Respondent argues that these vehicles were "additional compensation" for Petitioner's services to the Trust and were intended to be marital property. The evidence at trial established that the money to purchase these vehicles came from the Trust, but that the vehicles were initially registered in Petitioner's name. Thereafter, on or about November 23, 2005, Petitioner requested that the Division of Motor Vehicles issue a "corrected" Utah certificate of title for the two vehicles to reflect ownership by Petitioner as trustee of the Trust. The vehicles were insured under the parties' homeowner's policy, but Petitioner testified (without challenge by Respondent) that the cost of the insurance was paid by the Trust.

¶32 Based on the evidence presented the Court finds that while the parties benefitted from the use of these vehicles for a period of time, the 2003 Taurus and the 2004 Ford F-150 should properly be considered as part of the Trust estate which paid to purchase and insure them.

Dogs

¶33 The parties own four dogs, each valued at approximately $800. Petitioner has retained possession of the dogs. Therefore, it is fair and appropriate that Respondent receive an offsetting credit in the amount of $3,200.

Coin Collection and Silver Granules

¶34 The parties acknowledge that Respondent had a coin collection that predated their marriage. There is also agreement that in July 2003, Respondent paid Petitioner's mother approximately $8,840 for some coins. That payment was made with a check from an account bearing the names of both parties. Petitioner has alleged that Respondent took the coin collection with him when the parties separated and has since hidden or otherwise disposed of the coins in order to make them unavailable to her. Respondent denies Petitioner's claim.

¶35 At trial Respondent was asked directly where the coins were located. Because of Respondent's concern that the items would "disappear" if he disclosed their location in open

court, arrangements were made to have a representative of the Taylorsville Police Department search the location identified by Respondent. The location turned out to be at the residence that has been occupied by Petitioner since the May 2005 incident. The police officer was accompanied by the parties' attorneys. The police officer who conducted the search reported to the Court that none of the items sought had been found.

¶36 Although the Court could reasonably infer from what transpired at trial that Respondent is not in possession of these items, the Court has insufficient evidence to render a specific Finding on this issue. In short, the Court cannot find that one or the other of the parties is more likely than not to have these items within his/her possession. Accordingly the Court declines to credit the value of these items against either of the parties' share of the marital estate. However, if at a later date there is evidence presented that one of the parties indeed has maintained control or disposed of these items, it would be appropriate for the aggrieved party to seek sanctions under an Order to Show Cause.

¶37 In the Stipulation Respondent acknowledged that "he has sole control" over several packets of silver ore (the "granules"). Stipulation, at ¶16. Petitioner alleged that this ore is the property of Petitioner's mother; Respondent claimed it had been a gift to him from Petitioner's mother after it was determined that the ore did not contain gold. Petitioner bears the burden of proof and, presumably, she could have had her mother testify about this issue. The fact that she chose not to present the most persuasive and direct evidence available (her mother's testimony), suggests to the Court that her mother's testimony would not have supported her contention. Given that the Court has already determined that Petitioner's uncorroborated testimony is not credible, the benefit of the doubt goes to Respondent.

Home Furnishings

¶38 Respondent alleges that Petitioner retained most of the home furnishings after he was escorted out of the home on May 2005. He requests that the Court award him a gun cabinet and pool table, both of which are presently in Petitioner's possession, and another $2,000 to balance out the value of the furnishings retained by Petitioner. Petitioner did not object to or comment on this request by Respondent. The Court therefore awards the requested items and the $2,000 offset to Respondent.[13]

Operating Engineers Pension Account and IRAs

¶39 Petitioner maintains that the "marital estate commenced to be accumulated beginning

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[13]At the time the Court orally announced its Findings to the parties and counsel, on Petitioner's behalf her counsel requested that Respondent be required to arrange for a bonded and insured mover to pick up and transport the pool table and gun cabinet from Petitioner's residence. The Court finds that this is a reasonable request and will require Respondent to make those arrangements.

May 1982." Petitioner's Trial Brief, at 1-2. Petitioner asks to be awarded one half of Respondent's retirement pension account with the Operating Engineers Trust Fund for the period of May 1982 through the date the Divorce Decree enters. Respondent argues that the moneys accumulated in his pension account premaritally, i.e., before May 1984, should be deemed his separate property, and that the Court should divide the marital estate as of the date of separation. The Court disagrees with Petitioner's argument and finds that Respondent's pension accruals prior to the date of marriage should be considered his separate pre-marital property. The Court also finds that the provisions in the parties' Stipulation regarding the separation of their financial interests (wages, debts, etc) applies to Respondent's pension account. Petitioner's claim to an equitable share of Respondent's pension benefits also terminates as of May 10, 2005.

¶40 The value of an IRAs established premaritally by the parties should be considered separate property. To the extent, if at all, that contributions were made to pre-existing or newly established IRAs between the parties' marriage and separation, those amounts should be considered marital assets and equitably divided between the parties.

Miscellaneous Matters

Taxes Paid on Interest

¶41 During tax years 2005 and 2006 Respondent declared and paid taxes on the funds he withdrew from the parties' joint accounts. Additional interest has accumulated for tax years 2007 and 2008, although it is not clear whether Respondent actually paid taxes on the 2007 interest, and the 2008 tax year has not yet closed. Respondent acknowledges that Petitioner should receive one-half of the interest that has accrued on these funds between 2005 and now, but wants Petitioner to pay one half of the taxes he has paid on the accrued interest. The Court finds that Respondent acted intentionally and wrongfully in emptying out the marital accounts immediately upon the parties' separation, and in transferring those funds to accounts solely within his control. Although Respondent has testified–without challenge by Petitioner–that he has returned to the marital estate $20,908.27 of what he had previously withdrawn, the Court finds that it would be inequitable to allow these actions by Respondent to go unsanctioned. Thus, while the Court agrees that Petitioner is entitled to one-half of the interest that has accrued on the marital funds under Respondent's control, the Court finds it is fair and appropriate that Respondent *alone* bear the tax consequences of the marital funds he has had under his control.

Cash value of Petitioner's Life Insurance

¶42 The parties have stipulated that Petitioner's life insurance has a cash value of $13,045.00 and that it is a marital asset. Respondent should be awarded one half of that cash value.

Respondent's Payments on Behalf of Petitioner and/or Her Son

¶43 Petitioner has not contested Respondent's request that he be given credit for the moneys he loaned Petitioner's son. Petitioner also acknowledges that Respondent made various payments on her behalf and that he should receive an offset for those payments prior to dividing the marital estate.

Recoupment for Respondent's Personalty Sold by Petitioner

¶44 Petitioner has admitted selling ammunition and ammo reloading equipment belonging to Respondent for "$36 and a dinner." Respondent has estimated that it will cost $2,500 to replace all the equipment which he maintains Petitioner sold.[14] However, Respondent has provided no support for his cost estimate. For example, there was no indication that Respondent's estimate accounts for depreciation due to age of the equipment, "wear and tear," and whether some of it may have become obsolete technology in the interim period. The Court has directed Respondent's counsel to provide documentation supporting his client's claim. The Court finds that in disposing of Respondent's equipment for a "fire sale" price Petitioner acted wrongfully, and therefore she should be held liable for reimbursing Respondent for any documented value that Respondent is able to provide in support of his estimated replacement cost.

Azite Mine Investment (aka Custom Milling and Grinding)

¶45 Per the terms of the parties' Stipulation, they will each be allocated a 50% interest in that investment, subject to each bearing one half the costs, including attorneys fees, associated with the venture.

Protective Order

¶46 Petitioner desires to have the protective order issued in 2005 made permanent; Respondent wants to have it lifted so that he may recover certain weapons that have been held in police custody since the May 2005 incident. Respondent argues that the parties have had no direct dealings with each other since that time and there is no reason to maintain the order. Based on the history of these parties the Court is persuaded that it is appropriate to maintain some form of decorum order to govern the parties' direct and indirect dealings with each other. However, the Court has been presented with no persuasive argument for why the existing and one-sided protective order should be maintained in its present form. The Court finds that it is fair and appropriate that the existing protective order terminate and be replaced with a mutual restraining order that prohibits both parties from engaging in harassing behavior or referencing the other–directly or indirectly--in a demeaning or derogatory manner

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[14]Respondent claims that Petitioner also disposed of his binoculars and of some camping equipment. Petitioner denies the claim. Because of Petitioner's general lack of credibility and the fact that, for the most part, Petitioner has maintained control over all personalty at the residence since Respondent was removed in May 2005, the Court is inclined to resolve these disputed issues in favor of Respondent.

Attorney's Fee Requests

¶47 Both parties have asked the Court to award attorney's fees in this action. As represented in the affidavit for fees and expenses submitted by Petitioner's counsel, Petitioner has incurred a total of $140,499.59 in fees including $122,294.50 in attorney's fees, $11,093.25 in accounting services, and lesser amounts in other services. The affidavit filed by Respondent's counsel reflects $137,495.05 in fees and services, of which $130,130.50 is for attorney's fees. At the time the Commissioner certified this matter for trial he commented that "each party has caused the other party to incur some unnecessary fees." The Commissioner noted, however, that "there may be a difference in extent and this may be a reason for some modest adjustment by way of attorney's fees." Minutes for Pretrial Conference, November 28, 2007.

¶48 In reviewing the history of this case as reflected in the Court's file and case docket, of which the Court takes judicial notice, it is apparent that in this highly contested case the parties have brought number of motions including at least one set of cross motions to compel discovery. See, e.g., Respondent's Motion and Memorandum to Compel Discovery and for Sanctions and to Extend Discovery, filed 5-26-06; Petitioner's Motion to Compel, filed 6-16-06. The matters were heard by the Commissioner on 6-21-08 and Respondent prevailed on that motion. The issue of attorney's fees was reserved for later determination. Petitioner objected to the Commissioner's recommendation, prompting additional briefing to this Court. The Court affirmed the Commissioner's recommendation.

¶49 Thereafter, on 7-6-06, Petitioner brought motions to quash Subpoenas deuces Tecum and for a Protective Order, again seeking to shield herself from legitimate discovery by Respondent. Respondent had to incur fees opposing those motions. At a hearing on 7-25-06, the Commissioner denied both of the Petitioner's motions. Petitioner again objected to the Commissioner's recommendation, requiring further briefing in response by Respondent's counsel. After careful review, this Court again affirmed the Commissioner's Recommendation by Minute Entry Ruling on 10-24-06.

¶50 An Order to Show Cause for failure to return personal property to Respondent (including his mother's personal papers) was certified against Petitioner on 11-06-06, with attorney's fees issues reserved for trial. At the same hearing the Commissioner ordered that a third party accompany the parties in a "walk through" of the residence to inspect for documents and other property of Respondent or his mother's could be found there. At trial, Respondent continued to assert that some items of his personal property had still not been produced, but there was no evidence presented specifically regarding his mother's personal papers. Therefore the Court infers that the parties' "walk-through" resolved this issue.

¶51 On or about 2-2-07, Respondent filed a number of motions and supporting memoranda seeking to quash subpoenas deuces tecum issued by Petitioner and directed to third parties. Later that same month and pursuant to an agreement with Petitioner, Respondent withdrew his various motions, but not before Petitioner had to respond to at least some of those motions.

¶52 Yet another motion to compel was filed on or about 7-30-07, this time by Petitioner, who was seeking Respondent's financial records. Petitioner alleged she needed the discovery to support her renewed claim for alimony. At a hearing held 8-20-07, the Commissioner determined and recommended that Petitioner's motion to compel be denied because Petitioner had used her waiver of alimony as a shield in the discovery process.

¶53 Petitioner objected to the Commissioner's Recommendation. On 9-11-07, after reviewing the parties' briefing on that issue, the Court affirmed the Commissioner's Recommendation and overruled Petitioner's objection. The Court made it clear in its ruling that "[petitioner's] opportunity to conduct further discovery regarding Respondent's finances for purposes of alimony has now closed." Minute Entry of 9-11-07.

¶54 On 9-28-07, Petitioner then sought to have the Trust she controls as co-trustee intervene in the case. Again, briefing by Respondent was necessary to oppose that motion. The Commissioner recommended that the motion to intervene be denied, and reserved for later determination Respondent's request for attorney's fees incurred by him in opposing the motion to intervene.[15] This Court agreed with and affirmed the Commissioner's Recommendation.[16]

¶55 In making their respective requests for attorney's fees, neither party has specified the bases for their requested fees. Fees could be sought under Utah Code §30-3-3(1) or (2), or under Utah R. Civ. P. 37 as a discovery sanction, and under the Court's contempt powers as a contempt sanction.

¶56 At trial neither party expressly addressed his or her need for assistance with attorney's fees, nor the other party's financial ability to assist with those fees. Both counsel's affidavits recite that they believe the fees charged are reasonable for the local market and necessarily incurred in prosecuting their client's cases.

Based on the foregoing Findings of Fact, the Court now enters its:

CONCLUSIONS OF LAW

¶57 Jurisdictional requirements for entering a Divorce Decree are met in this case

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[15]At that same hearing the Commissioner recommended that Respondent's motion to quash a subpoena deuces tecum issued to Utah Community Credit Union be denied. He also denied Petitioner's request for attorney's fees on the motion to quash.

[16]The Court notes this was the second attempt to intervene in this case by individuals or entities related to Petitioner. The first time was in September 2006 when Helen Powell (Petitioner's mother and co-trustee of the Trust) sought to intervene in the case. That request was denied by the Commissioner. The Commissioner's Recommendation of denial was affirmed by this Court by Minute Entry in October 2006.

¶58 Petitioner repeatedly and validly waived her claim to alimony.

¶59 A Divorce Decree should enter in this case on the ground of "irreconcilable differences" as pled in the Complaint.

¶60 For the reasons given in the Findings of Fact, there should be income imputed to Petitioner from the Trust in the amount of $312,740. Interest on this amount should be calculated at an annual rate of 5% (simple interest). Respondent is entitled to his equitable share of that amount as reflected in offsets and credits for the benefit of Respondent, to be taken against the parties' other assets.

¶61 The Respondent should take his mother's inheritance (including moneys from her bank account) free and clear of claims by Petitioner. Those funds are awarded to Respondent as his separate property, together with all interest accrued.

¶62 The general rule is that the marital estate is valued as of the time of the divorce decree or trial. However, the Court has discretion to select a different date for valuing the estate if justice so requires. Because these parties have generally ordered their financial arrangements *vis à vis* the other as of the date of separation, the Court concludes that it is fair and appropriate to value the marital property as of that date. The only exception to this is the valuation of the marital residence, which Petitioner had appraised as of June 2008, and which Respondent accepted and adopted as an appropriate valuation date.

¶63 The Court values the marital residence at $181,000 and the Divorce Decree will include an award to Respondent for one half that value.

¶64 Based on the Findings herein, the Divorce Decree will implement the various offsets noted.

¶65 The 2003 Taurus and the 2004 Ford F-150 are the property of the Trust, and not marital property.

¶66 Respondent's holds a pre-marital interest in the Operating Engineers Pension account. The contributions to that account from the time the parties married until they separated are marital property. Contributions to that account after the parties' separation are Respondent's sole and separate property.

¶67 It is appropriate that a mutual restraining order enter as part of the Divorce Decree; the existing protective order will terminate.

¶68 Neither party has made the required showing of need and of the other party's ability to pay in support of their respective requests for attorneys fees under Utah Code §30-3-3 and Utah R. Civ. P. 102. However, Respondent has established, by a preponderance of the evidence, that

he had to bring, and prevailed in, Orders to Show Cause because of Petitioner's failure to comply with discovery. The Commissioner had reserved the issue of attorneys fees for those OSCs and the Court concludes that having prevailed substantively in those proceedings, it is appropriate that Respondent recover the reasonable attorneys fees incurred in bringing and defending those proceedings. See *supra* Findings, ¶¶48, 50 Additionally, Respondent had to defend a motion to compel brought by Petitioner on or about 7-30-07. The Court awards Respondent his reasonable attorneys fees in connection with defending against that motion pursuant to its authority under Utah R. Civ. P. 37. Findings at ¶¶52-53.

¶69 The Court also awards attorneys fees to Respondent for defending the second motion to intervene in this case. Findings at ¶54.

¶70 The Court awards any attorneys fees that Respondent may have incurred in his efforts to secure the inheritance funds awarded to him as part of the October 2005 Stipulation but which have been "frozen" by, or on behalf of, Petitioner. *See* note 11, *supra*

¶71 Under Utah R. Civ. P. 37, the Court awards to Petitioner her attorney's fees incurred in connection with defending against Respondent's motions to quash various subpoenas deuces tecum brought on or about February 2007. Findings, at ¶51.

¶72 Except as otherwise provided herein, no other attorneys fees are to be awarded.

¶73 The attorney's fee affidavits that have been submitted do not specify the amounts spent to address the issues for which attorneys fees have been specifically authorized. Counsel will need to submit those affidavits for the Court's review to establish the reasonableness of the attorneys fees expended as noted herein at ¶¶ 68 through 71 inclusive.

ORDER

¶74 Respondent's counsel is directed promptly to prepare and file a Decree of Divorce that conforms with these Findings of Fact and Conclusions of Law.

¶75 Counsel are directed to provide to the Court within ten (10) days of these Findings of Fact and Conclusions of Law, specific affidavits focused only on the items addressed at ¶¶ 68 through 71 inclusive.

Entered this 10th day of October, 2008. By the Court:

Judge Denise Posse Lindberg

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 054902600 by the method and on the date specified.

METHOD	NAME
Mail	TOM D BRANCH Attorney RES 1350 E DRAPER PKWY DRAPER, UT 84020
Mail	MARY P MCGEE Attorney PET 1855 E BROOKHILL DR SALT LAKE CITY UT 84121

Dated this 16 day of Oct, 20 08.

MB

Deputy Court Clerk

0TOM D BRANCH, L.L.C.
TOM D BRANCH (3997)
1350 East Draper Parkway
Draper, UT 84020
Telephone: (801) 553-1500
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Attorney for Respondent

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

RITA Y. RICHINS, Petitioner, vs. JAMES E. RICHINS, Respondent.	**DECREE OF DIVORCE** Civil No.: 054902600 Judge: DENISE P. LINDBERG Commissioner:

In the above-captioned matter, a bench trial was held in this case on August 4th, and August 5th, 2008. Petitioner was present and represented by her counsel, Mary Paxman McGee. Respondent was present and represented by his counsel, Tom D Branch. The Court heard testimony and received exhibits offered by both parties, and took the matter under advisement. After review of the testimony and exhibits the Court entered its Findings of Fact, Conclusions of Law and Order dated October 15, 2008. The Findings of Fact and Conclusions of Law and Order are incorporated herein together with the Minute Entry clarifying said Findings dated March 6, 2009, and based thereon, the Court, being fully advised in the premises, now decrees the following:

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

JURISDICTION, VENUE AND GROUNDS

1. Petitioner and Respondent are actual and bona fide residents' of Salt Lake County, State of Utah, and have been so for more than three (3) months immediately prior to the commencement of this action.

2. Petitioner and Respondent are husband and wife, having been married in Salt Lake County on May 26, 1984, in the State of Utah. The parties separated on May 10, 2005.

3. During the course of the marriage, there have arisen differences in the party's lifestyles, beliefs and attitudes toward each other such that they have been unable to reconcile those beliefs and attitudes so as to remain living together as husband and wife. As a result of the foregoing irreconcilable differences, the marriage is irretrievably broken, making it impossible for the marriage to continue and the Court grants Petitioner a Decree of Divorce dissolving the bonds of matrimony heretofore existing between the parties, the same to become final upon entry, upon the grounds of irreconcilable differences.

PROVISIONS RELATING TO ALIMONY

4. The Court ruled prior to trial on more than one occasion that Petitioner had repeatedly and validly waived her alimony claim. Nevertheless, at trial, Petitioner sought to again proffer grounds in support of a renewed claim for alimony. Petitioner has provided no facts that would justify a change to the Court's prior rulings, which are incorporated herein, and as set forth in the Court's Findings. No material facts have changed since the last time the Court addressed this issue, therefore, Petitioner's claim for alimony has been waived, and there are not

sufficient facts presented to justify any claim for same, and therefore no alimony is awarded.

PROVISIONS RELATING TO DISTRIBUTION OF MARITAL ASSESTS

5. The parties stipulated to cash and cash equivalent amounts at the time of trial of $447,471.94 held in various accounts in their respective names as itemized below:

ACCOUNTS IN PETITIONER'S NAME

FINANCIAL INSTITUTION		ACCOUNT #	BALANCE AT TRIAL
Salt Lake Credit Union	Checking	53240	428.06
Salt Lake Credit Union	Shares	53240	26.45
Salt Lake Credit Union	Money Mrkt	53240	569.31
Salt Lake Credit Union	CD	53240	1,217.62
Salt Lake Credit Union	IRA	53240	3,641.45
Salt Lake Credit Union	IRA	53240	3,509.01
Salt Lake Credit Union	IRA	53240	3,448.27
Operating Engineers CU	Checking	226042	501.12
Operating Engineers CU	Savings	226042	5.77
Operating Engineers CU	IRA	226042	26,754.81
			$ 40,101.87

ACCOUNTS IN RESPONDENT'S NAME

FINANCIAL INSTITUTION		ACCOUNT #	BALANCE AT TRIAL
America First	Savings	883606-6	27.01
America First	Certificate	883606-6	81,620.17
State Farm Bank	Savings	1009810290	54,209.38
State Farm Bank	IRA	1009849452	64,002.61
State Farm Bank	IRA	1009903039	75,501.75
State Farm Bank	IRA	1009849449	4,027.18
Cyprus Credit Union	Reg. Shares	xxxxx136	49.07
Cyprus Credit Union	Money Market	xxxxx136	.55
Cyprus Credit Union	Certificate	16957	43,950.24
Cyprus Credit Union	Certificate	17070	25,412.94
Mountain America CU	Savings	xxxxx1990	25.00
Mountain America CU	Money Mrkt	xxxxx1990	5,430.99
Mountain America CU	Certificate	xxxxx1990	7,892.46
Operating Engineers CU	Money Mrk	227578	62.40
Operating Engineers CU	Checking	227578	220.64
Operating Engineers CU	IRA	227578	8,963.55
Operating Engineers CU	Certificate	227578	26,819.41
Salt Lake Credit Union	Shares	50008	31.33
Salt Lake Credit Union	Money Mrkt	50008	9.27
Salt Lake Credit Union	IRA	50008	9,114.12
			$ 407,370.07 Respondent's Total
			40,101.87 Petitioner's Total
			$ 447,471.94 TOTAL

6. However, the Court concludes pursuant to its Findings that it is fair and appropriate to value the marital estate as of the date of separation, May 10, 2005. Therefore, the combined cash and cash equivalent of the accounts at separation are as itemized below:

ACCOUNTS IN PETITIONER'S NAME AS OF DATE OF SEPARATION:

FINANCIAL INSTITUTION		ACCOUNT #	BALANCE AT MAY 10, 2005
Salt Lake Credit Union	Checking	53240	1,653.21
Salt Lake Credit Union	Shares	53240	25.78
Salt Lake Credit Union	Money Mrkt	53240	4,049.02
Salt Lake Credit Union	CD	53240	1,063.46
Salt Lake Credit Union	IRA	53240 #2785	3,182.03
Salt Lake Credit Union	IRA	53240 #3958	3,094.13
Salt Lake Credit Union	IRA	53240 #5084	3,014.67
Operating Engineers CU	Checking	226042	3,481.71
Operating Engineers CU	Savings	226042	2,863.10
Operating Engineers CU	IRA	226042	26,010.91
			$ 48,438.02 Petitioner's total

ACCOUNTS IN RESPONDENT'S NAME AS OF DATE OF SEPARATION:

FINANCIAL INSTITUTION		ACCOUNT #	BALANCE AT MAY 10, 2005
America First	Savings	883606-6	780.97
America First	Certificate	883606-6	71,013.16
Vanguard	IRA		56,224.13
Vanguard	IRA, Roth		3,537.75
Cyprus Credit Union	Reg. Shares	xxxxx136	6,166.51
Cyprus Credit Union	Certificate	16957	38,138.94
Cyprus Credit Union			4,630.42
Mountain America CU	Savings	xxxxx1990	25.00
Mountain America CU	Money Mrkt	xxxxx1990	6,960.34
Mountain America CU	Certificate	xxxxx1990	3,005.66
Mountain America CU			5,043.26
Operating Engineers CU		227578	1,344.60
Operating Engineers CU		227578	2,004.84
Operating Engineers CU			37,941.56
Operating Engineers CU			43,989.59
Operating Engineers CU			24,263.82
Operating Engineers CU			5,242.08
Operating Engineers CU		227578	9,611.82
Operating Engineers CU	IRA	227578	66,378.37
Operating Engineers CU	IRA, Roth		8,653.86
Salt Lake Credit Union	Shares	50008	30.46
Salt Lake Credit Union	Money Mrkt	50008	2,654.15
Salt Lake Credit Union	IRA ROTH	50008	8,078.21
			$ 405,719.50 Respondent's total
			$ 454,157.52 TOTAL OF ACCOUNTS

7. The parties entered into a Stipulation concerning the partial distribution of marital assets on or about October 14, 2005. The terms of the stipulation were reduced to writing and entered as a Temporary Order by this Court on October 27, 2005. Each party received approximately $200,000 from that division. The Court incorporates that Order herein.

PROVISIONS RELATING TO PETITIONER'S WAGES FROM POWELL FAMILY TRUST

8. Petitioner was employed by the Trust for no less than 82.3 months at a gross monthly wage of $3,800 per month, for a total gross imputed earnings of $312,740. The Court imputes income to Petitioner for the time period set forth in the Findings of $312,740 together with interest at 5% per annum, and deducts taxes at 33% per annum. The amount awarded to Respondent is one half of Petitioner's net income from the trust to be paid directly or as an offset from the equitable division of the parties' cash equivalents or assets. Respondent's one-half share is $134,364.75. (*See* accounting of "Petitioner's Wages from Trust", Exhibit "A".)

PROVISIONS RELATING TO THE CASH VALUE OF LIFE INSURANCE

9. Petitioner has a Life insurance policy with a cash value of $13,045 and Respondent is entitled to one-half of the value, or $6,522.50, to be paid directly or as an offset from the equitable division of the parties' cash equivalents or assets.

PROVISIONS RELATING TO THE MARITAL HOME

10. The martial home is valued at $181,000 and Respondent shall be entitled to one half of the value of the home in the amount of $90,500.00 to be paid directly or as offset from the equitable division of the parties' cash and cash equivalents or other assets.

PROVISIONS RELATING TO TAXES PAID ON INTEREST

11. Respondent shall be solely liable for all taxes he paid from interest on the funds he withdrew from the parties' joint accounts for the tax years 2005 through 2008.

PROVISIONS RELATING TO CD FUNDS PREVIOUSLY DIVIDED

12. Based on the October 2005 Order, two (2) certificates of deposit were divided. The Petitioner received a CD, valued at $34,960 and Respondent received a CD valued at $33,525.07. The Respondent is awarded the difference between the two (2) certificates of deposits in the amount of $1,434.93, to be paid directly or offset from the equitable division of the parties' cash and cash equivalents or other assets.

PROVISIONS RELATING TO CASH ACCOUNTS, CERTIFICATES OF DEPOSITS, VEHICLES AND PERSONAL PROPERTY

13. The Respondent is entitled to a net credit of $5,400, which represents the difference in the values of the vehicles of previously-distributed property, and is to be paid directly or offset from the equitable division of the parties' cash and cash equivalents or other assets.

14. The additional items of personal property not already in Respondent's possession that shall be granted to the Respondent shall be the gun cabinet and the pool table along with an additional $2,000 to balance out the value of the furnishings retained by Petitioner. $2,000 shall be paid directly or offset from the equitable division of the parties' cash and cash equivalents or other assets. Because of the cost and inconvenience to move the gun cabinet and pool table, the Respondent voluntarily forgives his right to said items and they are hereby awarded to Petitioner.

15. Respondent shall also be awarded an amount equal to the estimated value of the personal belongings Petitioner sold or otherwise disposed of by Petitioner. Respondent has supplied a current estimate to replace the stated items in the amount of $1,453.70 but the Court feels the submission does not make any adjustment to account for age and condition of the terms, nor improvements in technology. To compensate for those considerations, the Court award judgment in favor of Respondent in the amount of $1,200.00 and that amount is awarded to Respondent and is to be paid directly or offset from the equitable division of the parties' cash and cash equivalents or other assets.

16. The Respondent shall be granted as non-marital property any and all granules or packets of silver ore.

17. Both parties shall be allocated a 50% interest in the investment of the Azite Mine (aka Custom Milling and Grinding) and both parties' shall share one-half of the costs, including attorneys fees, associated with the venture.

18. The Respondent is awarded the amount of $3,200 for the value of the parties' dogs to be paid directly or offset from the equitable division of the parties' cash and cash equivalents or other assets.

19. The Respondent is awarded $3,600 as an offset to the amount of monies "loaned" to Petitioner's son, Erin Kowal, to be paid directly or offset from the equitable division of the parties' cash and cash equivalents or other assets.

20. The Respondent is awarded as non-marital funds the amount of $55,416.85, which represents the total amount of Respondent's inheritance funds held at Cyprus Credit Union

that were "frozen" by Petitioner's counsel, and previously ordered to be released, together with interest accrued on the funds in the amount of $349.14.

21. Petitioner shall within 30 days notify all financial institutions to release all funds held in Respondent's name and social security number as listed herein:

Salt Lake City Credit Union

Operating Engineers Credit Union

America First Credit Union

Mountain America Credit Union

State Farm Bank

Failure on the part of Petitioner to comply with this Order shall subject her to the full panoply of Court Sanctions, including contempt.

22. After separation Respondent paid Petitioner's personal bills in the amount of $7,737.00 from Respondent's post separation wages (personal non-marital funds), therefore Respondent is awarded twice that amount, or $15,474.00, to be paid directly or offset from the equitable division of the parties' cash and cash equivalents or other assets.

PROTECTIVE ORDER DISMISSAL

23. The Court hereby immediately terminates, dismisses and dissolves the Protective Order against Respondent and Orders that he receive all his guns and other property being held by the Bureau of Crimes Investigation in Taylorsville. This Decree is an Order to release said property to Respondent immediately. Respondent is awarded all personal property currently in his possession, his guns and all other property set forth in this Decree.

PROVISIONS RELATING TO DEBTS, OBLIGATIONS AND LIABILITIES

24. Pursuant to U.C.A. §15-4-6.5 the parties shall provide to their appropriate creditors notice pursuant to said statute by service of a copy of the Decree of Divorce that the parties are divorced and further advise said creditors of their separate and current address to take advantage of said statute that no report of the debtor's repayment practices or credit history may be made regarding the joint obligation after the creditors have notice of the Court's order unless the creditor has made a demand on the debtor for payment because of failure to make payments by the other debtor who is ordered by the Court to make the payments. The parties shall inform any creditors (of a joint obligation) of the allocation of responsibility for payment herein and to keep any such creditors informed of their current addresses for purposes of notification.

PROVISIONS RELATING TO RETIREMENT ACCOUNTS

25. The Court finds that Respondent's pension accruals prior to the date of the parties' marriage shall be his separate pre-marital property. The Court orders that the pension account be divided as of the date of separation, May 10, 2005. Petitioner shall have claim to a spouses share of Respondent's pension benefits from the date of their marriage (May 26, 1984) to the date of separation (May 10, 2005). Contributions and interest accumulations to that account before marriage and after the parties' separation are Respondent's sole and separate property. The parties are to cooperate fully in drafting a Qualified Domestic Relation's Order (QDRO) consistent with this Decree, and Petitioner is responsible to complete the QDRO with mutual agreement of the parties.

INTEREST ON FUNDS AND IRA ACCOUNTS

26. The value of any IRA's established premarital by the parties shall be considered separate property. (The Respondent accrued pre-marital an IRA that with interest to

date of separation amounts to $23,891, *See* Accounting of Interest of IRA, Exhibit "B") To the extent, if at all, that new contributions were made to pre-existing or newly established IRA's between the parties' marriage and separation, those amounts shall be considered marital assets and equitably divided between the parties.

PROVISIONS FOR AWARDS OF THE MARITAL ACCOUNTS

27. Some of the cash accounts held by the parties as itemized in paragraph 6 of this Decree, are traditional IRA pre-tax accounts. The court finds that a tax should be applied to these amounts of 33% to properly allow for the present value of said accounts as follows:

Total of IRA accounts for Petitioner:	35,301.74
Amount of tax paid on IRA's @ 33%	-11,649.57
	$ 23,652.17
Total of IRA accounts for Respondent	122,602.50
Less pre-marital IRA	-23,891.12
	98,711.38
Amount of tax paid on IRA's @ 33%	-32,574.75
	$ 66,136.63

28. Based on the awards set forth herein, the Court approves the below as a summary of the division of assets:

PETITIONER	RESPONDENT
48,438.02 (cash at separation)	405,719.50 (cash at separation)
268,729.51 Rita's income from Trust (see exhibit A)	< 55,416.85> see paragraph 20 of Decree
	<349.14> see paragraph 20 of Decree
13,045.00 Life Insurance value	<23,891.12> see paragraph 26 of Decree
181,000.00 marital home	
CD's division	<1,434.93> see paragraph 12 of Decree
Vehicle division	<5,400.00> see paragraph 13 of Decree
Rita's bills paid by Jim	<15,470.00> see paragraph 22 of Decree
Personal Property	<2,000.00> see paragraph 14 of Decree

	Jim's personal property sold	<1,200.00> see paragraph 15 of Decree
	Dogs	<3,200.00> see paragraph 18 of Decree
	Loan to son	<3,600.00> see paragraph 19 of Decree
$ 511,212.52		$ 293,757.46
-11,649.57	for 33% tax on IRA's (see paragraph 27 of decree)	-32,574.75 for 33% tax on IRA's
499,562.95		261,182.71

29. The total of the parties' estate and accounts is $760,745.66. When divided by one-half it equals $380,372.83 which is the amount awarded to each party. Once the amounts currently under the control of each party are considered, the Petitioner owes the Respondent $119,190.12 before any award of attorney fees.

30. In order to compensate the Respondent for the amount due him as set forth in the preceding paragraph and the amount of attorney fees awarded him in paragraph 32 hereafter, the Petitioner is ordered to take immediate actions to liquidate or transfer any and all assets she has or that are awarded to her herein to pay Respondent. Petitioner is ordered to pay Respondent the full amounts awarded to him in this Decree within 15 days of its entry, and if she is unable to do so then a judgment shall automatically enter for any balance not paid on that date, together with Judgment and interest per law.

PROVISIONS RELATING TO RESTRAINT

31. Both the Respondent and the Petitioner are mutually restrained from engaging in harassing behavior towards the other, including treatment of the other in a demeaning or derogatory manner, directly or indirectly. Both parties are mutually restrained from contacting either party at their place of residence, employment or any other location and by any communication device. Both parties are restrained from initiating or participating in any communication or actions that would cause harm or threaten to harm to the other party.

ATTORNEY'S FEES AND COSTS

32. The Court awarded attorney fees and costs pursuant to paragraphs 68 through 71 of the Findings and pursuant to the Minute Entry dated March 6, 2009. The Respondent's counsel has prepared and filed a more detailed Affidavit for Attorney Fees and Costs as directed by the court. Respondent is awarded the amount of $ 45,954.00, to be added to the amount of debt set forth in paragraph 29 herein. This award of fees is given under Utah Code Sec. 30-3-3 (1) or (2), or under Utah R. Civ. P. 37 as a discovery sanction, and under the Court's contempt powers as a contempt sanction.

OTHER

33. Each party is ordered to execute and deliver to the other party without cost, any documents necessary to implement the provisions of the Decree of Divorce entered by the Court.

SEPARATE PROPERTY

34. Unless otherwise provided herein, all property and money received or retained by each party pursuant not addressed in this Decree of Divorce shall be the separate property of such party, free and clear of any right, interest or claim of the other party, and each party shall hereafter own, have and enjoy, independently of any claim or right of the other party, all items of real and personal property now or hereafter belonging to her or him, and each party shall have the right to deal with or dispose of her or his separate property, both real and personal, fully and effectively, in all respects and for all purposes.

WHEREFORE, The Court hereby enters and orders a Decree of Divorce pursuant to the terms set forth herein.

DATED this 14 day of April, 2009.

BY THE COURT:

THIRD JUDICIAL DISTRICT COURT

JUDGE DENISE P. LINDBERG

MAILING CERTIFICATE

I hereby certify that I sent via e-mail and regular mail, a copy of the foregoing DECREE OF DIVORCE to the following, postage prepaid, this 3rd day of April, 2009:

MARY PAXMAN MCGEE
1855 E. BROOKHILL DR.
SALT LAKE CITY, UT 84121

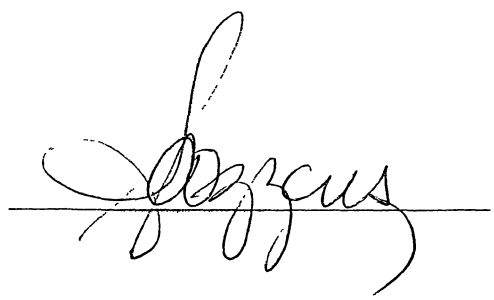

EXHIBIT "A"

TOM D BRANCH LLC
TOM D BRANCH (3997)
Attorney for Respondent
1350 East Draper Parkway
Draper, Utah 84020
Telephone (801) 553-1500
Fax (801) 553-1550

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

RITA Y. RICHINS, Petitioner, vs. JAMES E. RICHINS, Respondent.	)	**AFFIDAVIT OF LARRY TATUM** Civil No. 05490-2600 Judge: DENISE LINDBERG Comm:

STATE OF UTAH)
: ss
COUNTY OF SALT LAKE)

Larry Tatum, being first duly sworn upon oath, deposes and says as follows:

1. If called to testify my testimony would be as set forth herein.

2. I have a degree in Accounting from Utah State University, and I've been in the accounting profession for 40 years.

3. I am a Senior Tax Accountant for Larson & Rosenberger, LLP, located at 9065 South 1300 East in Sandy, Utah 84094.

4. Based on the Court finding the Petitioner had a gross monthly income of $3,800.00 per month from the July 1, 1998 through May 10, 2005, for a total amount of

82.3 months; considering the income tax at a rate of 33%; and calculating simple interest of 5% per year; I have calculated the amount due Petitioner.

5. For the first year (1998), the Petitioner would have gross income of $22,800 over six months, coming in at the rate of $3,800 gross per month from July through December. The total net income with interest at 1.25% (reflecting 5% as reduced to take into consideration the part year monthly income) for 1998 is therefore $15,466.95.

6. For the year 1999, the Petitioner would have gross income of $45,600, coming in at the rate of $3,800 per month for the whole year. Her net income with interest at 2.5% (reflecting 5% as reduced to take into consideration the monthly nature of the income) for 1999 would therefore be $31,315.80; to which I added the interest factor on the prior year net interest and added that amount of $518.15 to the total, for a balance of $47,300.90 through the end of 1999.

7. For the years 2000 through 2005 I applied the same calculations.

8. From May 10, 2005 I simply carried forward the calculation and the simple interest with no additional income considered to the end of February 2009. A summary of my calculations are as follows:

9. 1998: 22,800 at 1.25%= 285 : 23,085.00 – 33% =	15,466.95
1999: 45,600 at 2.50% = 1,140 : 46,740 – 33% =	31,315.80
Plus 15,466.95 at 5% = 773.35 – 33% =	518.15
	47,300.90
2000: 45,600 at 2.50% = 1,140: 46,740 – 33%=	31,315.80
Plus 47,556.10 at 5% = 2,377.80 – 33% =	1,593.13
	80,209.83

2001:	45,600 at 2.50% = 1,140: 46,740 – 33% =	31,315.80
Plus	80,209.83 at 5% = 4,010.49 – 33% =	2,687.03
		114,212.66
2002:	45,600 at 2.5% = 1,140: 46,740 – 33% =	31,315.80
Plus	114,212.66 at 5% = 5,710.63 – 33%=	3,826.12
		149,354.58
2003:	45,600 at 2.5% = 1,140: 46,740 – 33%=	31,315.80
Plus	149,354.58 at 5% = 7,467.73 – 33%=	5,003.34
		185,673.72
2004:	45,600 at 2.5% =1,140: 46,740 – 33%=	31,315.80
Plus	185,673.72 at 5% = 9,283.69 – 33%=	6,220.08
		223,209.60
2005:	16,340 at 4.15% = 678.11: 17,018.11-33%=	11,402.13
Plus:	223,209.60 at 5% = 11,160.48 – 33%=	7,477.52
		242,089.25
2006:	242,089.25 at 5%= 12,104.46-33%=	8,109.99
		250,199.24
2007:	250,199.24 at 5%= 12,509.96 – 33%=	8,381.67
		258,580.91
2008:	258,580.91 at 5%= 12,929.04-33%=	8,662.46
		267,243.37
2009:	267,243.37 at .83% for 2 months= 2,218.12 – 33%=	1,486.14
	End of February 2009:	**268,729.51**

10. Accordingly, the Petitioner is entitled to $268,729.51 in net income through February 2009.

FURTHER AFFIANT SAYETH NOT.

DATED this 4TH day of February, 2009.

Larry T. Tatum

LARRY TATUM

STATE OF UTAH)
:ss.
COUNTY OF SALT LAKE)

Larry Tatum, upon providing proper identification verifying his personage, being first duly sworn upon oath, deposes and says that he has read the foregoing document and knows and understands the contents thereof and agrees to the same. Further, that he executed the same.

Subscribed and sworn to before me this 4th day of February, 2009.

Donna McNair

NOTARY PUBLIC

Notary Public
DONNA McNAIR
3826 South 610 West
Salt Lake City, Utah 84119
My Commission Expires
November 14, 2009
State of Utah

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EXHIBIT "B"

3 YRS OF I.R.A. COMPOUNDING OF INTAEST

1982	2,000	@ 11% INTREST (STARTED 1-17-03 FOR TAX YEAR 1982)		
1983	2,000	11	6-30-83	
1984	2,000	11	~~APRIL 1984~~ 12-1-04	6,384.82
				6,929.24
1985		8.89%		7,545.00
1986		8.89%		8,215.75
1987		8.89%		8,946.13
1988		7.75%		9,639.45
1989		8.49%		10,457.83
1990		9.16%		11,415.77
1991		7.0%		12,214.87
1992		7.0%		13,069.91
1993		7.0%		13,984.80
1994		4.18%		14,569.36
1995		5.08%		15,309.48
1996		6.1%		16,243.35
1997		6.07%		17,229.32
1998		5.16%		18,118.35
1999		5.52%		19,118.48
2000		5.78%		20,223.53
2001		6.0%		21,436.94
2002		5.62%		22,641.70
2003		2.4%		23,185.10
2004		2.45%		23,753.13
2005		1.61%		24,135.56 8-4-05
2006		4.0%	(3% FOR 9 MONTHS)	24,859.63 AS OF ~~4-4-07~~ 5-4-07
2007		4.99%		26,102.61
2008		4.99%		27,730.76 8-4-08